

EXHIBIT 2

Deposition of Jose Zagal

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

CATHERINE ALEXANDER,

Plaintiff,

vs.

No. 3:18-cv-966-MJR-DGW

TAKE-TWO INTERACTIVE SOFTWARE, INC.,
2K GAMES, INC.; 2K SPORTS, INC.; WORLD
WRESTLING ENTERTAINMENT, INC.;
VISUAL CONCEPTS ENTERTAINMENT;
YUKE'S CO., LTD.; AND YUKE'S LA, INC.,

Defendants.

VIDEOTAPED DEPOSITION OF JOSE ZAGAL

August 1, 2019; 8:02 a.m.

St. Louis, Missouri

Reported by:

Kelli Ann Willis

Job no: 25723

<p style="text-align: right;">Page 2</p> <p>Videotaped Deposition of JOSE ZAGAL, pursuant to notice, taken by Defendants, at the offices of The Simon Law Firm, Suite 1700, 800 Market Street, St. Louis, Missouri, before Kelli Ann Willis, a Registered Professional Reporter, Certified Realtime Reporter and Certified Court Reporter in the State of Missouri.</p>	<p style="text-align: right;">Page 4</p> <p style="text-align: center;">I N D E X</p> <p>JOSE ZAGAL</p> <p>Examination by Mr. Simmons 6</p> <p>Examination by Mr. Friedman 238</p> <p>Further Examination by Mr. Simmons 242</p> <p style="text-align: center;">E X H I B I T S</p> <p>Deposition Exhibit 1 181</p> <p>Half-Life 2 Game Log</p> <p>Deposition Exhibit 2 223</p> <p>Destructoid article</p> <p>Deposition Exhibit 3 229</p> <p>Article, The 20 coolest tattoos in WWE History</p> <p>Deposition Exhibit 4 232</p> <p>Sportskeeda article</p>
<p style="text-align: right;">Page 3</p> <p>A P P E A R A N C E S:</p> <p>THE SIMON LAW FIRM, P.C.</p> <p>Attorneys for Plaintiffs</p> <p>800 Market Street</p> <p>Suite 1700</p> <p>St. Louis, Missouri 63101</p> <p>BY: ANTHONY R. FRIEDMAN, ESQ.</p> <p>afriedman@simonlawpc.com</p> <p>KIRKLAND & ELLIS LLP</p> <p>Attorneys for Defendant Take-Two</p> <p>601 Lexington Avenue</p> <p>New York, New York 10022</p> <p>BY: JOSHUA L. SIMMONS, ESQ. and</p> <p>MIRANDA MEANS, ESQ.</p> <p>joshua.simmons@kirkland.com</p> <p>miranda.means@kirkland.com</p> <p>K & L Gates</p> <p>Attorneys for WWE</p> <p>K&L Gates Center</p> <p>210 Sixth Avenue</p> <p>Pittsburgh, Pennsylvania 15222</p> <p>BY: CURTIS B. KRASIK, ESQ.</p> <p>curtis.krasik@klgates.com</p> <p>ALSO PRESENT: Jacob Arndt, Videographer</p>	<p style="text-align: right;">Page 5</p> <p>THE VIDEOGRAPHER: All right. This is Tape No. 1 of the videotaped deposition of Jose Zagal, in the matter of Catherine Alexander versus Take-Two Interactive Software, Inc., et al., in the United States District Court for the Southern District of Illinois, East St. Louis Division, Cause No. 318-CV-966-MJR-DGW.</p> <p>This deposition is being held at The Simon Law Firm, 800 Market Street, Suite 1700, St. Louis, Missouri, on August 1st, 2019, at approximately 8:02 a.m.</p> <p>My name is Jacob Arndt, and I'm the legal video specialist. The court reporter is Kelli Ann Willis.</p> <p>Will counsel please introduce themselves?</p> <p>MR. SIMMONS: My name is Joshua Simmons from Kirkland & Ellis. I'm here representing Take-Two Interactive Software and 2K Games.</p> <p>With me is Miranda Means, also from Kirkland, as well as Curtis Krasik from K&L Gates representing WWE.</p> <p>MR. FRIEDMAN: This is Tony Friedman from The Simon Law Firm, representing the Plaintiff.</p> <p>Thereupon:</p> <p>JOSE ZAGAL, PH.D.</p>

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<p>1 a witness named in the notice heretofore filed, 2 being of lawful age and having been first duly 3 sworn, testified on his oath as follows: 4 E X A M I N A T I O N 5 BY MR. SIMMONS: 6 Q. Good morning. 7 A. Good morning. 8 Q. Dr. Zagal -- I'm sorry, is it Zagal? 9 A. Zagal. 10 Q. Zagal. Are you presently employed? 11 A. Yes. 12 Q. By whom? 13 A. By the University of Utah. 14 Q. What is your title? 15 A. I am professor. 16 Q. Okay. Is that a tenured professorship? 17 A. No. 18 Q. Are you on a tenured track? 19 A. No. 20 Q. What is your relationship to the Plaintiff 21 in this case, Catherine Alexander? 22 A. What do you mean? 23 Q. I assume you're an expert on her behalf, 24 but do you have any other relationship with the 25 Plaintiff?</p>	<p>1 A. Yes. 2 Q. What was your testimony in that case 3 about, at a high level? 4 A. It was about whether one company's 5 technology was -- again, I'm trying to figure out 6 what things I can talk about. 7 It was a patent case, and so we were 8 trying to see if one company was infringing on the 9 other company's patent. 10 Q. Got it. 11 A different kind of situation from the one 12 we have in this case; is that right? 13 A. Yes. 14 THE VIDEOGRAPHER: Going off the record at 15 8:05 a.m. 16 (Thereupon, a recess was taken, after 17 which the following proceedings were held:) 18 THE VIDEOGRAPHER: This is the beginning 19 of DVD 2. We are back on the record at 20 8:07 a.m. 21 BY MR. SIMMONS: 22 Q. Dr. Zagal, have you ever testified in 23 court? 24 A. No. 25 Q. Now, I'm going to go over a couple of</p>
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<p>1 A. No. I actually don't know her. I do not 2 know her. 3 Q. Have you met with Ms. Alexander? 4 A. No. 5 Q. Have you spoken to her? 6 A. No. 7 Q. Have you been deposed before? 8 A. Yes. 9 Q. In what case or cases were you deposed? 10 A. I believe that is already in my report. I 11 don't remember the full name of the cases. 12 Q. Just the one case that's in your report? 13 A. Correct. 14 Q. Does Sagan versus Zynga sound correct? 15 A. Yes. 16 Q. What was the nature of that litigation? 17 A. I'm not sure how much I can discuss that's 18 not already in the public record. 19 Q. What do you remember the case being about 20 generally, assuming the complaint was filed 21 publicly? 22 A. Yes. It was a patent case. 23 Q. It involved video games? 24 A. Yes. 25 Q. You were called as an expert?</p>	<p>1 ground rules for the deposition, just so that we 2 understand each other. 3 Do you understand that my questions and 4 your answers are being recorded? 5 A. I do understand. 6 Q. And do you understand that while there is 7 no judge or jury here, your testimony is under oath? 8 A. I do understand. 9 Q. During this deposition, I'm going to need 10 you to answer my questions verbally, so that the 11 reporter can transcribe your answers. That means no 12 shaking of the head, no bobbing up and down. It 13 needs to be a verbal response. 14 Can you do that? 15 A. I understand. 16 Q. It's also important that we don't speak 17 over each other, which we haven't done thus far, but 18 if that happens, it makes it difficult for the court 19 reporter to take down what we're saying. 20 So do you understand that? 21 A. I do understand. 22 Q. Will you let me know if you can't hear any 23 of my questions? 24 A. Yes, I will let you know. 25 Q. Will you also let me know if you don't</p>

<p style="text-align: right;">Page 10</p> <p>1 understand any of my questions?</p> <p>2 A. Yes, I will let you know.</p> <p>3 Q. If you do answer, I'm going to assume that</p> <p>4 you understood my question and heard it; is that</p> <p>5 fair?</p> <p>6 A. Sure. Yes.</p> <p>7 Q. I'm also going to assume that you are</p> <p>8 going to answer completely, okay?</p> <p>9 A. Yes.</p> <p>10 Q. Is there any reason that you can think of</p> <p>11 why you would not be able to provide truthful</p> <p>12 testimony today?</p> <p>13 A. No, I cannot think of a reason.</p> <p>14 Q. Dr. Zagal, did you attend college?</p> <p>15 A. Yes, I did.</p> <p>16 Q. Where did you go?</p> <p>17 A. I've been to college several times, so do</p> <p>18 you want me to go chronologically?</p> <p>19 Q. Let's start at the first one.</p> <p>20 A. Okay. I went to -- I was an undergrad at</p> <p>21 the Pontificia Universidad Catolica de Chile, also</p> <p>22 known as Catolica.</p> <p>23 MR. SIMMONS: We can provide the court</p> <p>24 reporter a write-up of that later. She may not</p> <p>25 have caught all of the letters.</p>	<p style="text-align: right;">Page 12</p> <p>1 It includes those kind of things. Operations</p> <p>2 research, as well, and such.</p> <p>3 Q. And what kind of economics were you</p> <p>4 studying? Economics of engineers, I'm assuming.</p> <p>5 A. No. This is just sort of regular econ.</p> <p>6 Q. And why -- what was the connection between</p> <p>7 economics and your engineering study?</p> <p>8 A. Well, that's -- you asked me to define</p> <p>9 industrial engineering.</p> <p>10 Q. Oh, I'm sorry. You didn't take economics?</p> <p>11 A. As a student, yes.</p> <p>12 Q. So when you took economics in this</p> <p>13 program, what was the connection to engineering?</p> <p>14 What was the engineering focus of the economics</p> <p>15 course?</p> <p>16 A. I wouldn't say that there was -- it's not</p> <p>17 a special kind of economics. It was just sort of</p> <p>18 regular econ, the same kind that a business student</p> <p>19 might be taking in their own department. It's just</p> <p>20 part of the whole curriculum, and it includes those</p> <p>21 kind of things.</p> <p>22 Q. Did you feel you had a focus in undergrad?</p> <p>23 Did you focus on any particular study?</p> <p>24 A. Yes. Several.</p> <p>25 Q. And what would those be?</p>
<p style="text-align: right;">Page 11</p> <p>1 BY MR. SIMMONS:</p> <p>2 Q. What did you major in?</p> <p>3 A. I majored in -- I'm taking my time because</p> <p>4 basically it's a different undergrad program than</p> <p>5 there is in the United States.</p> <p>6 Q. Uh-huh.</p> <p>7 A. So when I graduated, I had a -- I'm a sole</p> <p>8 industrial engineer, with a computer science</p> <p>9 diploma. It's a six-year undergrad.</p> <p>10 Q. Got it. So --</p> <p>11 A. So you could say that I majored in</p> <p>12 computer science. You could also say I majored in</p> <p>13 industrial engineering.</p> <p>14 Q. Okay. When you say "industrial</p> <p>15 engineering," do you mean, like, buildings? What</p> <p>16 does industrial engineering mean in that program?</p> <p>17 A. Industrial engineering usually refers</p> <p>18 to -- or -- so it's -- I would like to think of it,</p> <p>19 like, a combination of your "regular" engineering.</p> <p>20 I'm doing air quotes for "regular."</p> <p>21 Q. You got down the non-verbal.</p> <p>22 A. Yes. And sort of business-related</p> <p>23 engineering things. So it covers things such as --</p> <p>24 there's a lot of statistics and finance and</p> <p>25 marketing and accounting, microeconomics, economics.</p>	<p style="text-align: right;">Page 13</p> <p>1 A. So I did a lot of work on video games,</p> <p>2 it's part of my undergraduate studies, computer</p> <p>3 science, and I would also say the industrial</p> <p>4 engineering aspects that we've discussed.</p> <p>5 Q. And when you say you focused on video</p> <p>6 games, was there something specific about video</p> <p>7 games or just video games in general?</p> <p>8 A. I would say video games in general, with a</p> <p>9 technical or more of a technical perspective.</p> <p>10 Q. When you say "technical perspective," do</p> <p>11 you mean the actual act of creating the video game,</p> <p>12 the coding of it?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. Did you graduate?</p> <p>15 A. Yes.</p> <p>16 Q. And when was that?</p> <p>17 A. I don't recall the exact year. That would</p> <p>18 be in my CV.</p> <p>19 Q. Okay. You said you went to multiple</p> <p>20 colleges. Did you go to another college after that?</p> <p>21 A. Yes.</p> <p>22 Q. Where was that?</p> <p>23 A. In the United States.</p> <p>24 Q. Okay. Where did you go?</p> <p>25 A. I would like to clarify, because I have an</p>

<p style="text-align: right;">Page 14</p> <p>1 undergraduate there, but I also got a master's 2 degree from the same university we discussed before. 3 Q. Was that at the same time or were those 4 consecutive? 5 A. Um, there was an overlap. 6 Q. And the master's degree is in what? 7 A. The name of the degree is engineering 8 sciences. That was more in practice. If you look 9 at the course work and the research work I did, I 10 would say that is computer science. 11 Q. So that is non-video game coding, that 12 kind of thing? 13 A. That included video game work, for sure. 14 Q. Oh. And was the focus of that on coding 15 for video games and other computer programs? 16 A. The focus of the master's, no. 17 Q. What was the focus of the master's? 18 A. Computer science. 19 Q. Anything more specific? 20 A. It's a master's, so no. The master's in 21 computer science is a degree that's well known. 22 This one wasn't called a master's in computer 23 science; it was called a degree in engineering 24 science, but the course work was all computer 25 sciences.</p>	<p style="text-align: right;">Page 16</p> <p>1 Q. He was well regarded in the field of video 2 games, right? 3 A. I would say so, yes. 4 Q. You have cited to his work? 5 A. I'm pretty sure, yes. I couldn't 6 guarantee that, but I would be surprised if I 7 hadn't. 8 Q. He's a prolific author, right? 9 A. Yes. 10 Q. Have you ever taken an intellectual 11 property course? 12 A. A single course whose only focus was 13 intellectual property, I don't think I have. 14 Q. Do you have an understanding of what a 15 copyright is? 16 A. I would say I have an educated layperson's 17 understanding. 18 Q. What is your understanding of what a 19 copyright is? 20 A. So copyright is a legal term. 21 Q. Uh-huh. 22 A. That is used to protect artistic or 23 creative artifacts. 24 Q. Is it your understanding that video games 25 are copyrighted?</p>
<p style="text-align: right;">Page 15</p> <p>1 Q. When you said you went to school in the 2 United States, where did you go? 3 A. Georgia Institute of Technology. 4 Q. Did you get a degree when you went there? 5 A. Yes. 6 Q. What degree? 7 A. Ph.D. in computer science. 8 Q. Now, are you familiar with Dr. Ian Bogost? 9 A. Yes. 10 Q. He teaches at the Georgia Institute of 11 Technology, correct? 12 A. Yes. 13 Q. I'm sorry. I'm going to have to ask that 14 you let me finish my question before you answer. I 15 know you're on the same track as I am, but it's just 16 going to be helpful for the court reporter. 17 So, I'm sorry, you said that you did know 18 Dr. Ian Bogost? 19 A. I do know Dr. Bogost. 20 Q. Did you know him when you were studying at 21 the Georgia Institute of Technology? 22 A. I believe we first met when I was studying 23 at Georgia Tech, yes. 24 Q. Were you his student? 25 A. Not that I recall.</p>	<p style="text-align: right;">Page 17</p> <p>1 MR. FRIEDMAN: I will just provide an 2 objection that Dr. Zagal is not here as a legal 3 expert. 4 You can go ahead and answer the question. 5 THE WITNESS: I would say that yes, video 6 games are copyrighted. They indicate as much 7 often on their materials, like their covers and 8 so on. 9 BY MR. SIMMONS: 10 Q. Video games are artistic, right? 11 A. All of them? No. But some are. 12 Q. And creating a video game involves 13 creativity, right? 14 A. Broadly speaking, yes. 15 Q. It involves choices of what to create? 16 A. Yes. 17 Q. Have you ever received any other education 18 other than the three locations we've talked about 19 thus far? 20 A. You mean formal university level? 21 Q. Yes. 22 A. That resulted in a degree? 23 Q. Either way. 24 A. So no, I do not have any other degrees. 25 Q. Uh-huh.</p>

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<p>1 A. I would say yes, that I have had other 2 educational opportunities at the university level 3 that were not degree-related or degree-dependent. 4 Q. Okay. Can you give me an example? 5 A. So I have attended workshops that are 6 designed to help the attendees learn things. 7 Q. So these would be at the university when 8 you -- where you are employed? 9 A. For example, yes. 10 Q. Or when you are visiting at another 11 university? 12 A. Yes, it could also include those. 13 Q. But they wouldn't be formal programs? 14 A. No, they would not be -- you would not get 15 a degree at the end of this workshop. 16 Q. Got it. 17 You wouldn't get, like, a certificate or 18 something either, right? 19 A. Not a formal certificate. There might be 20 a certificate of participating, like, I did this 21 thing, and that may have some value within certain 22 contexts. 23 Q. Okay. Did you receive any certificates 24 from these programs related to the subject matter 25 discussed in your expert reports in this case?</p>	<p>1 A. I believe in the context of realism in 2 video games. 3 Q. Do you remember who taught that course? 4 A. No. 5 Q. Do you remember what the subject matter of 6 the course that mentioned verisimilitude and realism 7 in video games was? 8 A. I'm not referring to a course; I'm 9 referring to a workshop. 10 Q. So in the workshop, do you remember what 11 the workshop -- do you remember what subject matter 12 the workshop that mentioned verisimilitude and 13 realism was? 14 A. The exact title, no, but it would have 15 been a digital games workshop. 16 Q. Do you remember what the takeaways were? 17 A. So the workshop I'm thinking of -- and 18 there have been several. I'm trying to think of the 19 specific one. They are not structured necessarily 20 like a class, where you're, like, these are things 21 you're supposed to take away. A lot of them consist 22 of presentations, but different participants in the 23 workshop, and it's about learning about other 24 people's work and what they're doing. 25 So, I wouldn't say there was like a key</p>
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<p>1 A. You mean related to games? 2 Q. Video games or anything you've talked 3 about in your expert reports. 4 A. As a formal workshop, I've been to many 5 video game-related workshops, yes, and some that 6 were not. 7 Q. Did any of them involve sports games? 8 A. Specifically sports games, not that I 9 recall. 10 Q. Did any of them involve verisimilitude? 11 A. What do you mean by "verisimilitude"? 12 Q. It's a word that you used in your report, 13 right? 14 A. Yes. But do you mean -- 15 Q. I mean it as you're using it in your 16 report. 17 A. Okay. 18 Q. Maybe I'll clarify the question. 19 In your report, you used the term 20 "verisimilitude." Is that a subject that was -- 21 that came up in any of those courses that you have 22 been talking about? 23 A. I'm thinking. I think it may have come 24 up, yes. 25 Q. And do you remember in what context?</p>	<p>1 takeaway from the workshop as planned by the 2 workshop creators, other than we want you to learn 3 about each other's work, and we have some speakers 4 who we think have interesting work to share. 5 Q. Did you present at this workshop or 6 workshops? 7 A. Yes. The one I'm thinking of 8 specifically, yes. 9 Q. What did you present? 10 A. I believe I presented on design patterns 11 in games. 12 Q. What are design patterns? 13 A. Design patterns, in the context of games 14 scholarship, is often used to refer to elements of 15 game design that can be abstracted from a specific 16 game and applied to other games commonly used, 17 but -- let me rephrase. 18 They refer to commonly-used design 19 solutions for something that you might see across 20 several games, even if they are not implemented in 21 exactly the same way. 22 Q. Do you want to give me an example of a 23 commonly-used design solution? 24 A. Sure. So, the concept of a health bar, 25 for example, as a visual element on a screen that is</p>

<p style="text-align: right;">Page 22</p> <p>1 used to provide information to the player of how 2 much health their character has, and thus, give them 3 a sense if they're in danger or not. That concept 4 might be called a design pattern and would be 5 implemented in different games in different ways. 6 Q. Did your presentation deal with realism in 7 video games? 8 A. I can't say for sure. 9 Q. You don't remember? 10 A. I don't remember if I -- if I mentioned 11 realism or not. 12 Q. But as far as you can recall sitting here 13 today, it wasn't the focus of that presentation? 14 A. Not necessarily the focus, but it is 15 plausible that I would have talked about realism. 16 Q. Do you remember any of the other 17 presentations that were given during any workshop 18 that involved realism or verisimilitude? 19 A. It's been a while, so I couldn't give you 20 a list of what all of the presentations were about. 21 Q. Do you remember any of them, though? 22 A. I couldn't detail specifically, no. 23 Q. Have you designed any video games? 24 A. Yes. 25 Q. What kind of video games have you</p>	<p style="text-align: right;">Page 24</p> <p>1 video games as a term in your field, that refers to 2 generally the pre-existing sports being put into a 3 video game? 4 A. Yes. 5 So when I mentioned that I did not make -- 6 I don't think I made a sports video game, I have not 7 made a video game that's connected to tennis or 8 football or hockey or any of the traditional sports. 9 Q. Have you made or have you designed any 10 games that involved the type of verisimilitude that 11 you discuss in your expert report? 12 A. I would say most -- that is something that 13 we can talk about pretty much all games. There are 14 degrees of. 15 So, in that sense, yes, I have made games 16 where verisimilitude was part of the game. 17 Q. Let me just ask you, when you say 18 "verisimilitude" here in your report, what does that 19 mean to you? 20 A. So the way I use it generally in the 21 context of the report is this notion of something 22 being like something else in a way that is authentic 23 to the something else. 24 Q. So, in your mind, is verisimilitude 25 different than a realism?</p>
<p style="text-align: right;">Page 23</p> <p>1 designed? 2 A. What do you mean by "what kind"? Like 3 what genre? 4 Q. Yes. 5 A. Hmm. I have designed 2D shooters, 6 educational, action. I would say several kinds. 7 That's not an exhaustive list. 8 Q. Have you designed any sports video games? 9 A. As the term is traditionally used, I would 10 say no. 11 Q. What do you mean by "as the term is 12 usually used"? 13 A. So in video games, and in video game 14 culture more broadly, there is a notion of a sports 15 video game as a game that is based on a non-video 16 game sport that exists. But there is also the 17 notion of -- of the game being used as sports, even 18 if there wasn't a certain design for that. 19 There's also the notion of E-sports, which 20 are video games designed to be also played as 21 sports. 22 So it's a little bit complicated. 23 Q. I understand. 24 So when you're using sports in your 25 field -- I'm sorry -- when you're using sports in</p>	<p style="text-align: right;">Page 25</p> <p>1 A. There's a lot of overlap, but they are 2 different concepts, I guess. 3 Q. How are they different? 4 A. So in the common use, the way the terms 5 are used, realism often refers to something being 6 like in the real world, which could be -- there's 7 lots of different angles for that. So maybe it 8 looks like -- maybe this character in this game 9 looks like the person that this character is based 10 off of and that person is a real-world person that 11 has a name, Social Security number, and so on and so 12 forth. 13 Realism could also mean in the game that 14 this game accurately models some real-world process, 15 right? So we might say this game -- in this game, 16 there is gravity, and so things fall in a certain 17 direction, and maybe the gravity in this game is 18 more or less realistic in the way it behaves in the 19 world. 20 In some games, you might say it's not 21 realistic because gravity is something you can turn 22 off and the characters float around. We don't do 23 that in our daily lives. 24 Q. How does that compare to your 25 understanding of the term "verisimilitude"?</p>

1 A. So where it gets tricky is, let's say
2 there's a Harry Potter game, and Harry Potter is a
3 fictional character. And Harry Potter is described
4 in a bunch of novels written by an author. And so I
5 could say -- and then there's a video game with
6 Harry Potter. There's a Harry Potter video game.

7 So if you ask me, is this Harry Potter
8 game realistic, I'd say, Well, it's based off --
9 well, the universe of Harry Potter described in
10 novels is not realistic. It's a fictional universe.
11 Magic exists. To my knowledge, magic does not exist
12 in the real world.

13 But we could still say that this -- this
14 game has verisimilitude with Harry Potter, because
15 the character in the game looks like the character
16 as the character is described in the novels, for
17 example.

18 So, in that sense, there's -- I can
19 recognize Harry Potter in this game from Harry
20 Potter in the novels.

21 Q. So if I'm understanding you correctly,
22 verisimilitude would be the concept of, if we're
23 taking your Harry Potter example, a Harry Potter
24 video game has certain elements from the fictional
25 Harry Potter universe, but if we wanted to create a

1 realistic video game based on the Harry Potter
2 films, that would focus more on depicting the actors
3 and actresses and the settings of the films
4 accurately in the video game.

5 Am I getting the line correct?

6 A. Yes, I think in part. So if we bring in
7 the films, we could say, Is this game based off of
8 novels or is it based off of the films? In that
9 case, if it's based off the films, you might expect
10 the characters to look like they do in the films,
11 where in the films, they might actually be different
12 from the novels.

13 So we could talk about realism and
14 verisimilitude together. We could say, Well,
15 there's verisimilitude to the films but not the
16 books, for example, or maybe it's to both.

17 We could also speak to the game being
18 realistic to the way things were depicted in the
19 movies that might have been different from the way
20 they are in the films.

21 So they are related terms.

22 Q. So when you talk about verisimilitude in
23 this case, where you're comparing a real-world
24 person to his depiction in a video game, is
25 verisimilitude and realism in that overlapping state

1 that you were just describing or are they two
2 different concepts?

3 A. They are related. And over -- over --
4 yes, partially overlapping, but not necessarily the
5 same.

6 Q. Okay.

7 A. And to clarify, and I would have to go
8 back to the report, I think there might be instances
9 where you could say, Well, maybe I'm using this
10 honestly and others were not. That I can tell you
11 off the top of my head.

12 Q. Have you designed any games that simulated
13 the real world?

14 A. Simulated the real world? The entire real
15 world, no.

16 Q. Parts of the real world?

17 A. Broadly, yes.

18 Q. Can you give me an example of a game --
19 maybe the most -- the game that was most similar to
20 the real world that you designed?

21 A. So I helped design a game, we had to keep
22 a ball from touching the ground, basically had to
23 tap on it to keep it in the air.

24 So, in that sense, we were going for
25 realism in the experience of keeping -- it's -- we

1 were trying to recreate an experience similar to the
2 one a child might have while playing with a balloon,
3 just sort of tapping it and just kind of keeping it
4 aloft and not losing control of it.

5 Q. Were the graphics of that video game
6 realistic or just the motion of the ball and gravity
7 and such?

8 A. I would say the graphics were stylized.

9 Q. What does "stylized" mean to you?

10 A. Oftentimes, when people say were the
11 graphics realistic, what they often mean is if you
12 were to show me, let's say, a picture of this game,
13 might someone think it was a depiction of the real
14 world, for example?

15 That's not what they were going for with
16 this game.

17 Q. Did you ever design a game where you were
18 trying to create a video game that a user would
19 think was a picture or a depiction of something in
20 the real world?

21 A. I have not designed a game that was trying
22 to achieve that level of quality in the resolution
23 of its graphics, no.

24 Q. You were talking about before the ball,
25 keeping-the-ball-in-the-air game?

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<p>1 A. Uh-huh.</p> <p>2 Q. And you said -- you were talking about</p> <p>3 realism with regard to the action of the ball and</p> <p>4 comparing that to the graphics of the ball?</p> <p>5 A. Uh-huh.</p> <p>6 Q. What would you call that sort of</p> <p>7 graphics -- not graphics, excuse me -- what would</p> <p>8 you call the gravity to the experiential side of the</p> <p>9 realism that you're talking about, as opposed to the</p> <p>10 graphics part?</p> <p>11 A. That's an interesting question. So</p> <p>12 sometimes in video games people are trying to</p> <p>13 recreate an experience. So we might imagine a</p> <p>14 skydiving game, where I want the player to feel like</p> <p>15 they are really skydiving. And there are degrees to</p> <p>16 that.</p> <p>17 So, in this case, by simulating gravity in</p> <p>18 a certain way and by designing the interface in a</p> <p>19 certain way and designing the feedback that the</p> <p>20 player receives in a certain way, we were trying to</p> <p>21 recreate the experience of -- or partially, I would</p> <p>22 say, because, obviously, if you're clicking on a</p> <p>23 mouse, you're not actually using your hands. You're</p> <p>24 not involved in that way, to recreate that</p> <p>25 experience of sort of keeping a balloon in the air.</p>	<p>1 there's a referent that you are using. So it's a</p> <p>2 degree to -- yeah. The broad category, if there's a</p> <p>3 referent, what is the relationship to that referent.</p> <p>4 Q. Anything else?</p> <p>5 A. Not that I can think of right now.</p> <p>6 Q. When you say if you're using a referent,</p> <p>7 you mean if there's a reference to a real-world</p> <p>8 object or person other setting --</p> <p>9 A. Or a fictional one.</p> <p>10 Q. -- or fictional, that might relate across</p> <p>11 those other categories, that might be related to the</p> <p>12 graphics, the experience, the audio?</p> <p>13 A. Yes.</p> <p>14 Q. Do you own a video game company?</p> <p>15 A. No.</p> <p>16 Q. Have you ever sold a video game to</p> <p>17 consumers?</p> <p>18 A. Yeah, I've sold video games.</p> <p>19 Q. In what context?</p> <p>20 A. Like, a used game.</p> <p>21 Q. Okay. Have you ever sold a game that you</p> <p>22 designed to consumers?</p> <p>23 A. Okay. No.</p> <p>24 Q. Have you ever licensed content to include</p> <p>25 in a video game you were designing?</p>
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<p>1 Q. So if I understand you correctly, I could</p> <p>2 talk about the graphics of a game and the experience</p> <p>3 of the game.</p> <p>4 Are there any other sort of categories of</p> <p>5 realism that you would describe for me?</p> <p>6 A. I would say there could be, and that list</p> <p>7 might be really, really long. It depends how</p> <p>8 specific you want to get.</p> <p>9 Q. But at the level of specificity with</p> <p>10 graphics and experience being in the list, is there</p> <p>11 a third or fourth thing that you would add to that</p> <p>12 list?</p> <p>13 A. Well, we could talk about physics. We</p> <p>14 could talk about audio. You could talk about the</p> <p>15 controls. You could talk about a lot of different</p> <p>16 things.</p> <p>17 Q. Is physics part of the experience or is it</p> <p>18 its own category?</p> <p>19 A. So the experience is often created by a</p> <p>20 sum of other things, too.</p> <p>21 Q. Other than graphics, experience, physics,</p> <p>22 audio, and the game controls, can you think of any</p> <p>23 other, at that level of specificity, categories of</p> <p>24 realism?</p> <p>25 A. I think broadly there's the notion of: If</p>	<p>1 A. No.</p> <p>2 Q. Have you written any articles about video</p> <p>3 games that simulate real life?</p> <p>4 A. I have written lots of articles about</p> <p>5 video games, and I'm pretty sure that real-life</p> <p>6 aspects is probably in at least one of them.</p> <p>7 Q. Can you think of the title of any article</p> <p>8 you've written that was about simulating real life?</p> <p>9 A. I would have to see the list of the</p> <p>10 articles to see if there's any which I would say,</p> <p>11 Yes, this article was about real life, or some</p> <p>12 aspect of real life in a video game.</p> <p>13 Q. What did you do to prepare for this</p> <p>14 deposition?</p> <p>15 A. Sorry, Matt. Matt?</p> <p>16 Q. Mr. Friedman?</p> <p>17 A. Yes. And we talked about what was going</p> <p>18 to happen today.</p> <p>19 Q. Anything else?</p> <p>20 A. And I read my reports again, because it's</p> <p>21 been a while.</p> <p>22 Q. Uh-huh.</p> <p>23 A. Obviously, I traveled to come here, and so</p> <p>24 on. I think that's the gist of it.</p> <p>25 Q. How long did you meet with Mr. Friedman?</p>

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<p>1 A. A couple of hours.</p> <p>2 Q. Was that yesterday?</p> <p>3 A. Yes.</p> <p>4 Q. Had you met with Mr. Friedman prior to</p> <p>5 yesterday?</p> <p>6 A. In person, no.</p> <p>7 Q. Have you spoken to Mr. Friedman on the</p> <p>8 phone in preparation for this deposition?</p> <p>9 A. No.</p> <p>10 Q. Was anyone else present when you met with</p> <p>11 Mr. Friedman?</p> <p>12 A. For the majority of our meeting, no.</p> <p>13 Q. And at any point?</p> <p>14 A. I'm not sure. I don't recall if someone</p> <p>15 came in and said something and then left, so...</p> <p>16 Q. But there was not someone in the meeting;</p> <p>17 it wasn't a meeting with other people?</p> <p>18 A. No.</p> <p>19 Q. How many hours would you say that you</p> <p>20 spent preparing for this deposition?</p> <p>21 A. Maybe three or four.</p> <p>22 Q. Did you speak to anyone besides</p> <p>23 Mr. Friedman to prepare for this deposition?</p> <p>24 A. At part of what I would call the</p> <p>25 preparation, no. Oh, we also met earlier today.</p>	<p>1 art form?</p> <p>2 A. Oh, man. I'm laughing because that is --</p> <p>3 that question has been the subject of so much debate</p> <p>4 and discussion over the years.</p> <p>5 Are you asking me my personal opinion on</p> <p>6 that question?</p> <p>7 Q. I'm asking your opinion as an expert in</p> <p>8 this case.</p> <p>9 A. I think video games as a medium are</p> <p>10 definitely a form of expression.</p> <p>11 Q. Do you like video games?</p> <p>12 A. Personally? Yes. I enjoy playing video</p> <p>13 games.</p> <p>14 Q. Me, too.</p> <p>15 There are developers of video games who</p> <p>16 are treated much the way like a tour filmmaker is</p> <p>17 treated, right?</p> <p>18 A. Well, I'm not really familiar with how</p> <p>19 filmmakers are treated in the way you refer to them.</p> <p>20 I would say that within the games</p> <p>21 industry, there are definitely some creators who are</p> <p>22 considered celebrities, in the general sense. How</p> <p>23 much their impact is outside of video games is a</p> <p>24 separate question.</p> <p>25 Q. And there are -- there are video game</p>
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<p>1 Q. Okay. Did you speak to -- you said -- I</p> <p>2 asked you did you speak to anyone besides</p> <p>3 Mr. Friedman to prepare for this deposition, and you</p> <p>4 said not that you would call preparation.</p> <p>5 A. Yes.</p> <p>6 Q. Was there something -- someone else,</p> <p>7 something else that would qualify in my question?</p> <p>8 A. I was referring to sort of assistants</p> <p>9 saying, Hey, you know, this is the office, you can</p> <p>10 leave your things here, what would you like to order</p> <p>11 for lunch, those kinds of things.</p> <p>12 Q. Did you speak to anyone other than</p> <p>13 Mr. Friedman to prepare your report in this case?</p> <p>14 A. Not that I recall.</p> <p>15 Q. Have you discussed this case with anyone</p> <p>16 outside of the presence of Mr. Friedman?</p> <p>17 A. No. I'm trying to think if we might have</p> <p>18 had a phone meeting where Mr. Friedman was not part</p> <p>19 of the meeting. That's what I'm not sure about. I</p> <p>20 have to check my records.</p> <p>21 Q. Switching back to video games, we were</p> <p>22 talking earlier about -- you had said that they</p> <p>23 could be art, that they were artistic -- they could</p> <p>24 be artistic and creative artifacts.</p> <p>25 Do you think creating video games is an</p>	<p>1 creators whose artistic viewpoint is highly valued,</p> <p>2 right?</p> <p>3 A. I think there are video-game makers who</p> <p>4 broadly are considered artists or refer to</p> <p>5 themselves as artists. And many of them are popular</p> <p>6 in the sense that they have fans who are interested</p> <p>7 in the work that they put out.</p> <p>8 Q. Now, when a video game is created, the</p> <p>9 maker has to make some choices to make the video</p> <p>10 game a better audio/visual work, right?</p> <p>11 A. Broadly speaking, yes.</p> <p>12 Q. And not every choice a video game maker</p> <p>13 makes is designed to increase the profits of the</p> <p>14 game, right?</p> <p>15 MR. FRIEDMAN: Object to form.</p> <p>16 THE WITNESS: So that would depend on the</p> <p>17 maker and the choice, and you'd have to ask</p> <p>18 them.</p> <p>19 BY MR. SIMMONS:</p> <p>20 Q. But, in general, not every choice made by</p> <p>21 a creator of a video game is going to increase the</p> <p>22 profits of the game, right?</p> <p>23 MR. FRIEDMAN: Same objection.</p> <p>24 THE WITNESS: So in the context of games</p> <p>25 that you intend to make a profit with, because</p>

<p style="text-align: right;">Page 38</p> <p>1 there are some people who make games who don't</p> <p>2 intend to make a profit, and --</p> <p>3 BY MR. SIMMONS:</p> <p>4 Q. Some people do them for free, right?</p> <p>5 A. Correct.</p> <p>6 So if your goal is to make a profit with</p> <p>7 the game, I think you could argue that all the</p> <p>8 choices are somehow related to that ultimate goal,</p> <p>9 which is making a profit.</p> <p>10 Q. Do you think that's something that's</p> <p>11 specific to video games or true of all expressive</p> <p>12 works?</p> <p>13 A. I think it's probably true of all</p> <p>14 expressive forms in which you're trying to make a</p> <p>15 profit, where that is your ultimate goal.</p> <p>16 Q. So taking your Harry Potter example, is</p> <p>17 your view that J.K. Rowling's choice in the Harry</p> <p>18 Potter book series were all intended to make a</p> <p>19 profit?</p> <p>20 A. Well, you'd have to ask J.K. Rowling what</p> <p>21 her ultimate goal was. And I think it's plausible</p> <p>22 that she might have had several. She might say, I</p> <p>23 would like to make a living, and I would like to</p> <p>24 make some sort of expressive -- I might have</p> <p>25 something I wish to express as well.</p>	<p style="text-align: right;">Page 40</p> <p>1 can have different goals when creating the video</p> <p>2 game?</p> <p>3 A. Yes, I think different people on a team</p> <p>4 working on a video game could have different goals.</p> <p>5 Q. And individual people working on a video</p> <p>6 game could make choices to achieve more than one</p> <p>7 goal, right?</p> <p>8 A. Yes, they could.</p> <p>9 Q. So one goal would be making a profit,</p> <p>10 right?</p> <p>11 A. Uh-huh.</p> <p>12 Q. But another goal would be achieving</p> <p>13 recognition in the video game industry, right?</p> <p>14 A. For a specific individual, yes, that's a</p> <p>15 goal that they could have.</p> <p>16 Q. Another individual could make a choice in</p> <p>17 a video game to increase the quality of the video</p> <p>18 game?</p> <p>19 A. Yes.</p> <p>20 Q. Because I assume making a more</p> <p>21 high-resolution video game costs more money than</p> <p>22 creating a low-resolution video game, right?</p> <p>23 A. Broadly speaking, yes. And it depends</p> <p>24 what you mean by "resolution," also.</p> <p>25 Q. So if I'm creating a higher-resolution</p>
<p style="text-align: right;">Page 39</p> <p>1 Q. When J.K. Rowling put Diagon Alley in the</p> <p>2 Harry Potter novels, is there any reason to believe</p> <p>3 that that specific choice was only tied to making a</p> <p>4 profit?</p> <p>5 A. Only tied, no. But tied, I would say yes.</p> <p>6 Was she consciously aware of that? You would have</p> <p>7 to ask her. And I think you could say maybe yes and</p> <p>8 maybe no.</p> <p>9 I think she might say, Oh, I don't know.</p> <p>10 That's a great name. We could trademark this, and</p> <p>11 we could -- you know, licensing opportunities. I</p> <p>12 mean, there are all kinds of things she might have</p> <p>13 been thinking about; I don't know.</p> <p>14 Q. So is your view that the game company</p> <p>15 would have several different goals when they were</p> <p>16 making choices?</p> <p>17 A. That's a tricky one, because it assumes</p> <p>18 that a game company has only a single goal, and</p> <p>19 then, like, what is the game company, versus all the</p> <p>20 employees working at the company, what goals do they</p> <p>21 have and what input do they have in the game.</p> <p>22 So I'm not sure I could answer that.</p> <p>23 Q. Well, let me ask it a different way.</p> <p>24 Is it your view that the different people</p> <p>25 who are involved in creating a video game company</p>	<p style="text-align: right;">Page 41</p> <p>1 video game, it might relate to a profit question,</p> <p>2 but it also might relate to creating a video game</p> <p>3 that just looks better?</p> <p>4 A. It could also relate to both of them at</p> <p>5 the same time.</p> <p>6 Q. Right.</p> <p>7 Is that your view?</p> <p>8 A. My view is that there could be multiple</p> <p>9 goals, and one of them could be profits and others</p> <p>10 could be a different reason.</p> <p>11 Q. So in any given choice that is being made</p> <p>12 in the video game, that individual choice may not be</p> <p>13 dictated by profit, right?</p> <p>14 A. Yes, I think there are cases where that</p> <p>15 might -- or situations where that might be the case.</p> <p>16 Q. And you would agree that some of the</p> <p>17 details that would add to a video game might be put</p> <p>18 there to make it more fun for people playing it,</p> <p>19 right?</p> <p>20 A. Yes, that's a fair goal.</p> <p>21 Q. So, for example, you know, some video</p> <p>22 games have Easter eggs, where you don't need to</p> <p>23 achieve them to move forward in the game?</p> <p>24 A. Uh-huh.</p> <p>25 Q. But if you find them, it's sort of an</p>

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<p>1 enjoyable experience for those in the know, right?</p> <p>2 A. Uh-huh, yes.</p> <p>3 Q. And, in fact, there were, back before the</p> <p>4 Internet, magazines that would be published that</p> <p>5 say, you know, If you do this, you're going to get</p> <p>6 this special thing in the video game, right?</p> <p>7 A. Yes.</p> <p>8 Q. And we have the concept that if you press</p> <p>9 certain buttons, different features would unlock in</p> <p>10 the video game, right?</p> <p>11 A. Yes. That is a common feature.</p> <p>12 Q. You are familiar with the -- I don't</p> <p>13 remember what the name of it is, but the up, up,</p> <p>14 down, down, left, right?</p> <p>15 A. Left, right, A, B, yes.</p> <p>16 Q. Is there a name for that?</p> <p>17 A. It's called the Konami Code.</p> <p>18 Q. The Konami Code. The Konami Code would</p> <p>19 unlock special features of the video game, right?</p> <p>20 A. Yes.</p> <p>21 Q. But you could play the game through</p> <p>22 without ever knowing the Konami Code?</p> <p>23 A. Yes.</p> <p>24 Q. But if you put in the Konami Code sequence</p> <p>25 of buttons, you would get additional features that</p>	<p>1 sort of thing.</p> <p>2 Q. But when it was first created, that was</p> <p>3 not the case, true?</p> <p>4 MR. FRIEDMAN: Objection, calls for</p> <p>5 speculation.</p> <p>6 THE WITNESS: Yeah, I don't know about the</p> <p>7 origins of the Konami Code specifically.</p> <p>8 BY MR. SIMMONS:</p> <p>9 Q. You haven't studied it?</p> <p>10 A. Specifically the Konami Code, no.</p> <p>11 Q. Have you studied other Easter-egg-style</p> <p>12 things in video games?</p> <p>13 A. Hmm. That's a good question.</p> <p>14 I would say yes.</p> <p>15 Q. And in what context?</p> <p>16 A. So I teach in the class -- one of the</p> <p>17 classes I teach, we bring up -- we talk about Easter</p> <p>18 eggs as part of the -- sort of the context of the</p> <p>19 class.</p> <p>20 Q. And what is the content about Easter eggs?</p> <p>21 A. Specifically, amongst -- so one Easter egg</p> <p>22 in particular we talk about is an Easter egg which</p> <p>23 exists in the game called Adventure for the Atari</p> <p>24 2600 console, and --</p> <p>25 MR. FRIEDMAN: What game was that?</p>
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<p>1 were part of the game?</p> <p>2 A. It depends what you mean by "features,"</p> <p>3 but, yes, inputting the Konami Code, you would</p> <p>4 expect something to happen.</p> <p>5 Q. And that was a game-design choice people</p> <p>6 made because it was sort of a zeitgeisty, fun thing</p> <p>7 for people to do, right?</p> <p>8 MR. FRIEDMAN: Object to form. Ambiguous.</p> <p>9 THE WITNESS: I guess -- I'm not sure what</p> <p>10 you mean by "zeitgeisty." The Konami Code has</p> <p>11 a specific history, also.</p> <p>12 BY MR. SIMMONS:</p> <p>13 Q. But it wasn't -- video game companies</p> <p>14 wouldn't advertise what would happen if you put a</p> <p>15 special sequence of buttons. The point was that</p> <p>16 players would find them on their own?</p> <p>17 A. So with a Konami Code specifically, it is</p> <p>18 my understanding that players came to expect it to</p> <p>19 be there. And it became a part of -- this is in the</p> <p>20 context of games made by Konami.</p> <p>21 So there's a certain player expectation</p> <p>22 now. When they were trying -- it became an issue</p> <p>23 where we need to put this in, because if we don't,</p> <p>24 players will be upset, or they'll be sad because</p> <p>25 it's not there, and they'll be angry maybe, that</p>	<p>1 THE WITNESS: Adventure.</p> <p>2 MR. FRIEDMAN: It's just called Adventure?</p> <p>3 THE WITNESS: It's just called Adventure.</p> <p>4 It's a really old game.</p> <p>5 We talk about it as an early example of a</p> <p>6 game -- a person who participated in the</p> <p>7 creation of the game wanted to get attribution</p> <p>8 for their work.</p> <p>9 And so, basically, in this case, it was</p> <p>10 developed by a guy named Warren Robinett, and</p> <p>11 it gave a secret screen where his name appears,</p> <p>12 Warren Robinett.</p> <p>13 So we talk about it in the context of the</p> <p>14 attribution, and how, at the time, the policies</p> <p>15 of the company he was working at, which was</p> <p>16 Atari, excluded all the creators from the game.</p> <p>17 So if you buy this game at a store, you</p> <p>18 would not know, like, who made it. It was by</p> <p>19 Atari, not by, you know, a list of people who</p> <p>20 did different things. So he was angry about</p> <p>21 that.</p> <p>22 BY MR. SIMMONS:</p> <p>23 Q. What is the name of the course that you</p> <p>24 talked about the Atari game in?</p> <p>25 A. It was my Ethics in Video Games class, and</p>

<p style="text-align: right;">Page 46</p> <p>1 there's two versions that have very similar titles, 2 where we talk about it in both the grad version and 3 the undergrad version. 4 I teach a grad version of the class and an 5 undergrad version of the class, and we talk about 6 issues in both of them. 7 Q. You were mentioning before what people 8 would come to expect in the video games. 9 Have you ever researched about consumer 10 behavior in relation to video games? 11 A. If by research you mean read articles 12 about and looked for articles about, both scholarly 13 and non, yes. 14 Q. Have you ever written about consumer 15 behavior in relation to video games? 16 A. Broadly speaking, yes. 17 Q. Specifically? 18 A. So I have done research on game reviews, 19 both written by professionals, as well as written by 20 fans, and in this case fans would equal consumers. 21 Q. But you haven't researched -- that is -- 22 that is an example of using fan reviews. That is 23 not focused on consumer behavior with regard to how 24 they play video games, right? 25 MR. FRIEDMAN: Objection, argumentative.</p>	<p style="text-align: right;">Page 48</p> <p>1 "equivalent." 2 Q. Well, it's not -- it wouldn't be 3 scientifically rigorous, to use your word, to 4 conduct a study based on consumer reviews and draw 5 conclusions as to what every player of a video game 6 would do? 7 MR. FRIEDMAN: Objection, mischaracterizes 8 his earlier testimony. 9 THE WITNESS: So whether or not consumer 10 reviews are representative is a separate 11 question. And I don't know the answer to that 12 question. 13 BY MR. SIMMONS: 14 Q. So you don't know whether consumer reviews 15 are representative of all players of video games? 16 A. They may be; they may not be. 17 Q. But you don't know sitting here today? 18 A. No, I do not. 19 Q. Do you have any education on consumer 20 behavior in relation to video games? 21 A. By education, do I know things, have I 22 learned things? 23 Q. Have you taken course work? 24 A. Taken course work, no. But I have 25 designed course work.</p>
<p style="text-align: right;">Page 47</p> <p>1 THE WITNESS: So it's about consumer 2 behavior and how they play video games, because 3 that's what they're writing about, and you can 4 learn things about how people play video games 5 from what they write about them in reviews. 6 BY MR. SIMMONS: 7 Q. But not everyone writes a review when they 8 play a video game, right? 9 A. Correct. 10 Q. So that's a subset of the people who are 11 playing video games? 12 A. Yes. 13 Q. And you would agree that drawing 14 conclusions based on a subset of people is not 15 sufficiently rigorous to make assumptions about 16 everyone who is playing the video game, right? 17 A. So I would -- it is -- hmm. In the 18 positive scientific zones, I would be very -- I 19 would be hesitant to make claims about everybody in 20 the context of the studies that I've done, and I 21 don't think I did. 22 Q. But you would agree with me that looking 23 at consumer reviews is not an equivalent of what 24 every consumer playing a video game thinks? 25 A. Well, it depends upon what you mean by</p>	<p style="text-align: right;">Page 49</p> <p>1 Q. Do you teach a class on consumer behavior? 2 A. That's only on consumer behavior? Then, 3 no. 4 Q. Do you teach any classes that are largely 5 about consumer behaviors? 6 A. So I teach game design, and in my game 7 design classes, we incorporate what is called 8 player-centered design, which, broadly speaking, 9 refers to the idea of when designing a video game, 10 making sure that you understand how the player or 11 that you incorporate the player in that design, both 12 in terms of knowing if you're hitting whatever 13 design targets you want to hit. 14 In the practical sense, it also means 15 play-testing your game with players, seeing how they 16 react, are they understanding things you hoped they 17 would understand them, and so on. 18 So, in that sense, I'm using -- I'm 19 considering the consumer as player. And so, in that 20 sense, yes, because it really does matter that the 21 players, for example, if fun is one of the goals, 22 have fun with the game, how would you know that 23 without actually having them play the game. 24 Q. So market research would be one way of 25 knowing what consumers think about the video game,</p>

<p style="text-align: right;">Page 50</p> <p>1 right?</p> <p>2 A. Yes.</p> <p>3 Q. And in conducting market research, you</p> <p>4 might provide different consumers different</p> <p>5 experiences of the video game with different</p> <p>6 choices, and see how they react, right?</p> <p>7 A. I'm not sure I understand what you're</p> <p>8 asking me.</p> <p>9 Q. So I will rephrase it.</p> <p>10 You might provide different consumers</p> <p>11 versions of video games, where different choices</p> <p>12 were made, to see if they react differently to one</p> <p>13 set of choices than another?</p> <p>14 A. If you were doing market research, and you</p> <p>15 did that, that sounds -- that does not sound out of</p> <p>16 place or abnormal.</p> <p>17 Q. Just going back to the artistic choices</p> <p>18 you were talking about earlier, can the choice to</p> <p>19 make a game more realistic be an artistic choice?</p> <p>20 A. Can it? Yes.</p> <p>21 Q. Do video games get awards?</p> <p>22 A. All of them, no.</p> <p>23 Q. Do some?</p> <p>24 A. Yes.</p> <p>25 Q. And some of the games that get awards</p>	<p style="text-align: right;">Page 52</p> <p>1 A. Yes, that is fair.</p> <p>2 Q. And consumers might buy a game even when</p> <p>3 critics don't like it, right?</p> <p>4 A. There is relationship between -- and this</p> <p>5 varies from title to title. So I would say that</p> <p>6 there is a relationship between a critic's, critics</p> <p>7 at large, opinion of the game and the sales of the</p> <p>8 game.</p> <p>9 Q. But you would agree that just because one</p> <p>10 critic doesn't like a game doesn't mean consumers</p> <p>11 won't be making purchases in large numbers, right?</p> <p>12 A. If one specific critic -- it would depend</p> <p>13 on the critic, but I would say yes, sure. Some</p> <p>14 games might sell a lot, even though one critic hated</p> <p>15 it.</p> <p>16 Q. Just turning back again to the question of</p> <p>17 realism, not all games are designed to be realistic,</p> <p>18 right?</p> <p>19 A. I would say that not all games have -- not</p> <p>20 all game creators have that goal as a primary goal</p> <p>21 when making a video game.</p> <p>22 Q. Not all games are intended to have</p> <p>23 verisimilitude, right?</p> <p>24 A. I would answer the same as I just answered</p> <p>25 before. So not all creators would have that goal as</p>
<p style="text-align: right;">Page 51</p> <p>1 aren't necessarily the most highest selling, right?</p> <p>2 A. Yes.</p> <p>3 Q. Because what a game critic and a game</p> <p>4 purchaser thinks are good may be different, right?</p> <p>5 MR. FRIEDMAN: Object to the foundation.</p> <p>6 You can answer.</p> <p>7 THE WITNESS: Broadly speaking, yes. Yes,</p> <p>8 they could be. A consumer might want to buy a</p> <p>9 game for a reason that a critic might not</p> <p>10 consider whether giving an award, for example.</p> <p>11 BY MR. SIMMONS:</p> <p>12 Q. Well, and they might -- a consumer might</p> <p>13 buy a game for a reason that a critic would not</p> <p>14 think makes the game more valuable, right?</p> <p>15 A. What do you mean by "valuable"?</p> <p>16 Q. Well, isn't one of your -- the things</p> <p>17 discussed in your report a question of value?</p> <p>18 A. I would have to look at the report.</p> <p>19 Q. Do you remember talking about value in</p> <p>20 your report?</p> <p>21 A. I remember in the context of revenue, I</p> <p>22 believe.</p> <p>23 Q. Uh-huh. And so in the context of revenue,</p> <p>24 consumers might purchase a game even when a critic</p> <p>25 doesn't like it, right?</p>	<p style="text-align: right;">Page 53</p> <p>1 a primary goal in creating a game.</p> <p>2 Q. There are some games that are designed to</p> <p>3 be surreal, right?</p> <p>4 A. Possibly, but, again, I mean, you could</p> <p>5 say for something to be surreal, as in surrealism</p> <p>6 the art movement, then maybe you would have to</p> <p>7 consider how to make this game evoke the experience</p> <p>8 of surrealism as expressing other artworks in that</p> <p>9 movement.</p> <p>10 Q. But surrealism would not -- a surrealist</p> <p>11 video game would not be a realistic video game,</p> <p>12 right, based on the way we divided up the world</p> <p>13 before?</p> <p>14 A. Yes. Broadly speaking, probably not, but</p> <p>15 it could be if you said this game is really surreal</p> <p>16 because it really evokes, I don't know, Dali.</p> <p>17 Q. The video game industry is competitive,</p> <p>18 right?</p> <p>19 A. I would say yes.</p> <p>20 Q. And creating video games is expensive,</p> <p>21 right?</p> <p>22 A. Broadly speaking, yes.</p> <p>23 Q. There are a lot of people involved in</p> <p>24 creating games?</p> <p>25 A. Do you mean, like, the size of the</p>

<p style="text-align: right;">Page 54</p> <p>1 industry?</p> <p>2 Q. I mean in a video game company of, you</p> <p>3 know, most size, there will be different people</p> <p>4 performing different roles within the company?</p> <p>5 A. So the -- there are companies of lots of</p> <p>6 different sizes from really small to really large.</p> <p>7 Q. One of the roles in a video game company</p> <p>8 would be the code developers, right?</p> <p>9 A. So is code developing a common role in --</p> <p>10 in the games industry? You would call programmers</p> <p>11 or developers, sometimes used interchangeably, on</p> <p>12 those, but yes.</p> <p>13 Q. You would have to pay those people, right?</p> <p>14 A. Generally speaking, yes.</p> <p>15 Q. And you have to pay artists?</p> <p>16 A. So, generally, people that are employed by</p> <p>17 game companies are paid.</p> <p>18 Q. So game companies may have artists working</p> <p>19 on their games, right?</p> <p>20 A. Yes.</p> <p>21 Q. And they may have a licensing team for</p> <p>22 their games?</p> <p>23 A. Yes.</p> <p>24 Q. They might have a video game architect, a</p> <p>25 top-level developer, right?</p>	<p style="text-align: right;">Page 56</p> <p>1 they make a lot of titles.</p> <p>2 Q. When did your first become aware of them?</p> <p>3 A. Ah, I do not recall.</p> <p>4 Q. Was it over a decade ago?</p> <p>5 A. I'm not sure how long the companies have</p> <p>6 been around, so I don't want to say yes, and then,</p> <p>7 oh, the company has only been around for five years.</p> <p>8 I don't know. For a while, I guess, I</p> <p>9 would say.</p> <p>10 Q. Would you say that there is some -- that</p> <p>11 they produce some of the more high-quality games in</p> <p>12 the video game industry, in general?</p> <p>13 A. I would say that they don't have a</p> <p>14 reputation for bad games.</p> <p>15 Q. Do they have a reputation for good games?</p> <p>16 A. Ah, I think some of their titles have a</p> <p>17 reputation as being good games, yes.</p> <p>18 I don't know, I'm not familiar with all of</p> <p>19 the games they might put out. I'm guessing there's</p> <p>20 a few bad ones in there, because that's how the</p> <p>21 industry.</p> <p>22 Q. Do you think WWE 2K is a good game?</p> <p>23 A. It is -- it is not a personal -- so, in</p> <p>24 terms of my personal preference, it is not the kind</p> <p>25 of game that I play for my own personal enjoyment.</p>
<p style="text-align: right;">Page 55</p> <p>1 A. Yes.</p> <p>2 Q. And that person would get paid?</p> <p>3 A. If they are employed by the company,</p> <p>4 presumably, yes.</p> <p>5 Q. And video games with spoken word will have</p> <p>6 voice actors, right?</p> <p>7 A. Sometimes, yes; sometimes, no. That has</p> <p>8 been an issue for some companies.</p> <p>9 Q. If you have voice actors, you are going to</p> <p>10 pay them, too, right?</p> <p>11 A. Generally speaking, you're going to hire</p> <p>12 people, and that means paying them somehow.</p> <p>13 Q. And you can take years to produce a video</p> <p>14 game, right?</p> <p>15 A. Yes, it can.</p> <p>16 Q. Okay. Now, have you heard, before this</p> <p>17 case, of the company Take-Two Interactive Software?</p> <p>18 A. Yes.</p> <p>19 Q. And had you heard of the video game</p> <p>20 company 2K Games?</p> <p>21 A. Yes.</p> <p>22 Q. What was your understanding or what is</p> <p>23 your understanding of Take-Two and 2K?</p> <p>24 A. That they are video game companies and</p> <p>25 that their -- they have been around for a while, and</p>	<p style="text-align: right;">Page 57</p> <p>1 Q. Why not?</p> <p>2 A. There are other games that I like better</p> <p>3 for personal enjoyment.</p> <p>4 Q. What is the dividing line between the ones</p> <p>5 you enjoy and the ones that you don't?</p> <p>6 A. Familiarity with the genre, the kinds of</p> <p>7 choices you get to make in the game and the kinds of</p> <p>8 experiences it might provide.</p> <p>9 Q. So let me just ask you a little bit about</p> <p>10 it.</p> <p>11 First of all, is there anything else that</p> <p>12 you can think of as to why you wouldn't prefer WWE</p> <p>13 2K over the other games that you play?</p> <p>14 A. For why I wouldn't?</p> <p>15 Q. Yes.</p> <p>16 A. No. I think that covers it.</p> <p>17 Q. When you say "familiarity," what do you</p> <p>18 mean by that?</p> <p>19 A. That could mean a lot of things, but, for</p> <p>20 example, I may call a game called Destiny 2 a lot.</p> <p>21 And it's familiar to me because I played Destiny 1,</p> <p>22 and I really enjoyed it. So, in that sense, it's a</p> <p>23 familiar game.</p> <p>24 Q. But you didn't play prior versions of WWE</p> <p>25 2K, and so you're not as likely to play the current</p>

<p style="text-align: right;">Page 58</p> <p>1 version of WWE 2K?</p> <p>2 A. I mean, I have played WW -- I have played</p> <p>3 wrestling games before.</p> <p>4 Q. I'm asking about your familiarity points.</p> <p>5 You were saying that you played Destiny 2</p> <p>6 partly because you played Destiny 1, and my question</p> <p>7 was: So isn't it the case that you -- one of the</p> <p>8 reasons you don't prefer playing WWE 2K is that you</p> <p>9 aren't familiar with prior versions of the game?</p> <p>10 A. I'm not as familiar as maybe other games.</p> <p>11 Q. And that's one of the reasons that you</p> <p>12 would prefer to play the other games over WWE 2K,</p> <p>13 right?</p> <p>14 A. Yes, that could be one of the reasons.</p> <p>15 Q. Are you familiar with WWE wrestling?</p> <p>16 A. Yes.</p> <p>17 Q. Have you watched it?</p> <p>18 A. I have.</p> <p>19 Q. How often?</p> <p>20 A. Not very often.</p> <p>21 Q. Can you give me an approximation?</p> <p>22 A. Can you give me a sense of what you mean</p> <p>23 by --</p> <p>24 Q. In your life, how frequently are you</p> <p>25 watching WWE wrestling?</p>	<p style="text-align: right;">Page 60</p> <p>1 theatrics and also in their acting. It's</p> <p>2 entertaining.</p> <p>3 Q. How many times have you watched WWE</p> <p>4 wrestling since this case was filed?</p> <p>5 A. Oh, when was this case filed?</p> <p>6 Q. In the last two years.</p> <p>7 A. The last two years. Once or twice.</p> <p>8 Q. Do you remember what the wrestling event</p> <p>9 was?</p> <p>10 A. No.</p> <p>11 Q. Do you remember who was wrestling?</p> <p>12 A. No.</p> <p>13 Q. Did you watch WWE wrestling in preparing</p> <p>14 your report?</p> <p>15 A. No.</p> <p>16 Q. Would you say that you have studied WWE</p> <p>17 wrestling in your academic life?</p> <p>18 A. In my academic life, I have not studied</p> <p>19 wrestling.</p> <p>20 Q. What wrestling video games have you</p> <p>21 played?</p> <p>22 A. Oh, a bunch of them. I could not make a</p> <p>23 list of all of them. And their titles are very</p> <p>24 similar sometimes, so it's also...</p> <p>25 Q. Do you remember any of the titles?</p>
<p style="text-align: right;">Page 59</p> <p>1 A. I don't know. In my life. I guess on</p> <p>2 average, it would be once or twice a year.</p> <p>3 Q. Are you a WWE fan?</p> <p>4 A. I would not consider myself a WWE fan.</p> <p>5 Q. So when you're watching WWE wrestling, why</p> <p>6 are you watching it?</p> <p>7 A. That depends.</p> <p>8 Q. Do you want to give me an example?</p> <p>9 A. So I might watch it because some friends</p> <p>10 are watching it, and we are watching it together,</p> <p>11 and we are having fun together watching it.</p> <p>12 Q. Would you be inclined to choose to watch</p> <p>13 WWE wrestling instead of some other form of</p> <p>14 entertainment?</p> <p>15 A. I would, if there was, let's say, nothing</p> <p>16 else on, and we decided we want to watch something</p> <p>17 fun, then yes.</p> <p>18 Q. What do you like about WWE wrestling?</p> <p>19 A. What I've enjoyed about it when I've</p> <p>20 watched it is the acrobatics, sort of the -- it</p> <p>21 takes skill to be a wrestler, and it's kind of fun</p> <p>22 to see them pull off different moves and things like</p> <p>23 that.</p> <p>24 There's also the characters. The personas</p> <p>25 of the wrestlers themselves is also fun, in their</p>	<p style="text-align: right;">Page 61</p> <p>1 A. Probably some of the newer ones. And by</p> <p>2 that I mean, some of the titles that came out in the</p> <p>3 last three or four years. I have played some of the</p> <p>4 PlayStation-era ones.</p> <p>5 Q. Do you remember any of the titles of these</p> <p>6 games?</p> <p>7 A. Off the top of my head, no. Like I said,</p> <p>8 I don't want to get them wrong.</p> <p>9 Q. They're not your favorite games?</p> <p>10 A. No, they are not my favorite games.</p> <p>11 Q. And would you say that your sort of casual</p> <p>12 watching of the WWE doesn't make it more likely that</p> <p>13 you would want to play these kinds of WWE games?</p> <p>14 MR. FRIEDMAN: Objection to form.</p> <p>15 THE WITNESS: I'm not sure I understand</p> <p>16 your question.</p> <p>17 BY MR. SIMMONS:</p> <p>18 Q. Well, we were talking about familiarity</p> <p>19 before.</p> <p>20 A. Uh-huh.</p> <p>21 Q. And so you said you have watched one or</p> <p>22 two games a year over the last period of time.</p> <p>23 And so my question was: Do you think that</p> <p>24 the low frequency of watching WWE games contributes</p> <p>25 to the fact that you would rather play a different</p>

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1 video game than a WWE video game?

2 A. So as a consumer, I already said I was not
3 a fan of WWE in general. I don't consider myself a
4 fan. And so in that context, not being a fan means
5 it's less likely that I would buy a WWE game.

6 Q. And is that because fans of the WWE are
7 more likely to purchase WWE video games?

8 A. I think it's fair to say that fans of WWE
9 are more likely to buy a WWE game than non-fans.

10 Q. And part of that is because they are
11 familiar with the WWE, right?

12 A. Yes.

13 Q. Another thing you talked about with regard
14 to choosing -- not choosing WWE games was choices.
15 Do you remember that?

16 A. No. Could you remind me?

17 Q. You had given me a list of three things of
18 why you wouldn't enjoy playing the WWE games:
19 Familiarity, choices and experiences.

20 I want to talk about choices. Do you
21 remember giving me that list before?

22 A. No. That's why if we could look back. If
23 you could ask me a question.

24 Q. How about this: Is one of the reasons
25 that you don't prefer playing WWE 2K, that the

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1 choices available to you in the game are not
2 attractive to you?

3 A. It's a hard question to answer that
4 specifically. When I personally choose to buy a
5 game, I don't often come up with: Here's all the
6 choices that this game allows me, do I like these
7 choices, do I then buy the game. That's not a
8 metric that I would use consciously.

9 Q. Are there experiences in WWE 2K that are
10 the reason you don't choose to purchase those games
11 versus other games?

12 A. Other than experiences in the game that I
13 disapprove of, you mean?

14 Q. Or don't attract you to spend the money on
15 WWE 2K games versus other games.

16 A. So the WWE games provide lots of different
17 experiences. I would say that from my personal
18 preference as a player and consumer, my knowledge of
19 the experiences that are available in the game
20 aren't particularly attractive to me, and thus, I
21 choose not to purchase the WWE game.

22 Q. How would you describe someone who isn't
23 familiar with the WWE wrestling?

24 A. How would I describe it? I would describe
25 it as a -- well, what kind of person am I describing

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1 it to?

2 Q. Let's say a lay, average person. So in
3 that context, how would you describe WWE wrestling?

4 A. I would describe it as -- by "wrestling,"
5 you mean not the video game. You mean the TV shows
6 and all of that?

7 Q. Yes.

8 A. As a character -- something maybe that's a
9 larger-than-life -- I've never had to do that
10 before, so -- larger than life. I guess I would say
11 that it's larger than life. It's dramatic, it's
12 exciting, and it's athletic. It's a spectacle. I
13 guess I would probably use all of those words
14 somehow in a more coherent way.

15 Q. If you were to describe the setting of a
16 WWE wrestling match, how would you describe that?

17 A. Stadium, arena, a place with a crowd. But
18 also sort of back stage.

19 Q. Back stage drama?

20 A. Yes. And a lot of stuff is shot back
21 stage and sort of behind the scenes, as it were.

22 Q. Mr. McMahon addressing wrestlers or --

23 A. Or wrestlers arguing before they go out
24 there or yelling at each other or calling each other
25 out. I'm going in the ring, I'm going to destroy

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1 you, that sort of thing. A lot of that stuff
2 happens back stage, too.

3 Q. And in the wrestling arena, we have fans,
4 but what other elements would you expect to see in a
5 WWE wrestling match?

6 A. Wrestlers, lights, noise, spectacle.

7 Q. So if a student came to you and said, I
8 want to create a realistic WWE wrestling video game,
9 what element of the game do you think they would
10 have to have to satisfy your sense of realism?

11 A. If a student came to me and said I want to
12 make a WWE wrestling game and no such game existed
13 already?

14 Q. Uh-huh.

15 A. My first piece of advice to them would
16 say, You need to get a license to the WWE, you need
17 to get the characters.

18 Q. Let's assume that they -- that all of
19 these intellectual property issues are off the
20 table. It's just a question of game design.

21 So if a student comes to you and says, I
22 am allowed to make a WWE wrestling game, but --

23 A. I have all the characters.

24 Q. I want to make it realistic. What
25 elements do you think I have to have to make it

17 (Pages 62 to 65)

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1 realistic?

2 A. You have all the IP rights to all of the
3 characters. Well, you need to make sure that the
4 characters look like their non-video game
5 counterparts.

6 You need to make sure that they have all
7 of the right moves and animations; that they sound
8 like the wrestling counterparts.

9 Then you need to make sure that the game
10 play "works." I'm using "works" in air quotes here,
11 because that means a lot of different things.
12 That's a big term to unpack.

13 I would say those would probably be the
14 key things. I mean, I could make a huge laundry
15 list.

16 Also, we're talking about a student, I
17 would expect them to: You make a list, and we'll
18 talk about the list you make. Everything is a
19 learning opportunity.

20 Q. That's true, everything is a learning
21 opportunity.

22 Would you tell the student he should put
23 the characters in a wrestling arena, because that's
24 what you expect from a WWE wrestling match?

25 A. So to be completely honest with you, I

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1 would ask, What do you -- what do you want to do
2 with this game? What kind of experience do you want
3 to create for your players?

4 If their answer to that is, I want to make
5 this game like the shows, then I would also say,
6 Yes, then venues matter.

7 Q. In my question, I think what we're asking
8 is, if someone's goal was to make it realistic, what
9 elements would they need?

10 A. I would ask what they mean by "realistic."

11 Q. If they said, It's what you, Doctor,
12 taught me, Dr. Zagal, in our classes about video
13 game realism, what elements do you think I need to
14 include?

15 A. So we go back to characters need to look
16 like the characters, sound like the characters, move
17 like the characters. The physics in the -- the
18 physics needs to be realistic.

19 The -- and, again, if the goal is I want
20 to make this 100 percent like the show, then there's
21 a lot of graphic elements you have to make sure are
22 there. Are the logos in the right places, and the
23 ring needs to look like the ring does when it is in
24 this venue. Probably want the crowd to behave in
25 the way that's -- like the crowd behaves in the

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1 show.

2 If you have a story line, you would want
3 the story line to be a story line that is similar to
4 or that would make sense with the story line that
5 you might have in the show.

6 Those sorts of things.

7 Q. Have you played WWE 2K?

8 A. That specific title?

9 Q. Yes.

10 A. Possibly. Like I said, I have played a
11 bunch of them. I don't remember each one of the
12 titles.

13 Q. Well, you understand that there are
14 certain versions of WWE 2K at issue in this case,
15 right?

16 A. Yes.

17 Q. And that you put in an expert report
18 discussing those games, right?

19 A. Yes. So I have played.

20 Q. Did you play those video games in
21 preparing your expert report?

22 A. I played some of them, yes.

23 Q. Which ones did you play?

24 A. I would have to go back and check exactly
25 which ones.

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1 Q. How much of it did you play?

2 A. What do you mean by "how much"?

3 Q. How long did you play WWE 2K?

4 A. A couple of hours.

5 Q. Did you play it all the way through?

6 A. What do you mean by "all the way through"?

7 Q. Did you complete wrestling matches, did
8 you use the story mode, have you played the entirety
9 of WWE 2K?

10 A. I don't think it's possible to play the
11 entirety of WWE 2K. Did I play complete matches?
12 Yes. Did I play the story mode? Yes.

13 Q. Why is it not possible to play the
14 entirety of WWE 2K?

15 A. So at the fundamental level, for the same
16 reason why it is not possible to play the entirety
17 of baseball.

18 Q. And that is?

19 A. There is an infinite possible -- we could
20 play a baseball game right now and play another one,
21 and another one. There is no reason to stop.
22 Baseball isn't done, basically, so...

23 Q. Is it that you're saying that there are an
24 infinite number of permutations of the game so that
25 you could never play all of them?

18 (Pages 66 to 69)

<p style="text-align: right;">Page 70</p> <p>1 A. No. I mean, more literally, I could play 2 it online. And I could play the game online for as 3 long as servers are maintained and there are players 4 to play with. 5 Q. So your question is -- your answer is 6 based on the idea that you could keep playing the 7 video game forever? 8 A. Yes, so long as -- maybe not even on 9 online, just if my hardware supports it, then. 10 Q. Could you play the video game such as you 11 would have seen all of the elements that go into the 12 video game? 13 A. What do you mean by the "elements"? 14 Q. Would you have seen everything that is in 15 the game? 16 A. So some people would say yes, that is 17 possible. If I could be really strict and nitpicky, 18 I would say that no, that is not possible. 19 The version I played has a tool that 20 allowed you to create your own wrestler, for 21 example. And then, well, how many permutations are 22 there of that. And you can create your own wrestler 23 with all of these different features, and so on. 24 So could I create all the possible 25 wrestlers in the game? Hmm, probably not.</p>	<p style="text-align: right;">Page 72</p> <p>1 Q. It includes for whenever it's published 2 the current roster as a bottom line, and then 3 additional wrestlers on top of that? 4 A. I would say it includes a lot of 5 wrestlers, because they often include wrestlers 6 from -- that are not in the current roster. 7 Q. Right. But they do include the current 8 roster, plus additional wrestlers, right? 9 A. I couldn't state that for sure. 10 Q. You're not sure? 11 A. I'm not sure for a given year what the 12 current roster is and whether all of those show up 13 in the game. I'm not sure about that. 14 Q. And the fact there are so many wrestlers 15 is one of the selling points of the game, right? 16 A. Yes. 17 Q. It shows that players can play a variety 18 of characters, true? 19 A. Yes. 20 Q. And the professional wrestlers that appear 21 in WWE 2K are depicted how they appear in real life, 22 right? 23 A. Yes. 24 Q. And is it your understanding that the 25 professional wrestlers depicted in WWE 2K were</p>
<p style="text-align: right;">Page 71</p> <p>1 Q. Would you agree -- let me try that again. 2 Would you agree that WWE 2K is a realistic 3 depiction of WWE wrestling? 4 A. I would say yes. 5 Q. Would you say that WWE 2K includes the 6 elements that you have discussed with regard to the 7 core elements of WWE wrestling? 8 A. I would say yes. 9 Q. WWE 2K includes the stadium, right? 10 A. Uh-huh. 11 Q. And the arenas? 12 A. Yes, many of them. 13 Q. And the wrestling rings? 14 A. Yes, many of them. I don't know if all. 15 Q. WWE 2K includes professional wrestlers, 16 right? 17 A. Yes. 18 Q. It includes actually over 200 of them, 19 right? 20 A. Different titles will have different 21 numbers of wrestlers, and the number of wrestlers in 22 the game also varies on things such as content 23 provided afterwards. 24 If you were to say does it include a lot 25 of wrestlers, I would say yes.</p>	<p style="text-align: right;">Page 73</p> <p>1 created by photographing the wrestlers? 2 A. So I refer to, in my report, from the 3 materials I received, it seems that that was the 4 case, yes. 5 Q. And that WWE 2K replicates the 6 professional wrestlers' physical features, right? 7 A. Copies, yes. 8 Q. And WWE 2K replicates their faces, right? 9 A. Yes. It copies them, yes. 10 Q. And WWE 2K replicates their body types, 11 right? 12 A. Copies them, yes. 13 Q. And WWE 2K wrestlers are true to life, 14 right? 15 A. Broadly speaking, yes. 16 Q. WWE 2K also replicates referees, right? 17 A. Yes. Well, I'm not an expert in the WWE 18 wrestling. I don't know. 19 Q. Is it your understanding that the coaches 20 in WWE 2K are based on real-world coaches? 21 A. I would assume so. 22 Q. Is it your understanding that the arenas 23 in WWE 2K are based on real-world arenas? 24 A. I would assume so. 25 Q. And WWE 2K includes music, right?</p>

Page 74	Page 76
<p>1 A. Yes.</p> <p>2 Q. It includes announcers?</p> <p>3 A. Yes.</p> <p>4 Q. The announcers provide in-game commentary,</p> <p>5 right?</p> <p>6 A. Uh-huh, yes.</p> <p>7 Q. And the real wrestling matches, there are</p> <p>8 announcers that provide commentary, true?</p> <p>9 A. Yes.</p> <p>10 Q. WWE 2K has wrestling-related sounds,</p> <p>11 right?</p> <p>12 A. Yes.</p> <p>13 Q. And the sounds in WWE 2K replicate</p> <p>14 real-world sounds from WWE wrestling matches, true?</p> <p>15 A. Yes. I don't know if all of them.</p> <p>16 Q. But it sounds -- WWE 2K sounds like a WWE</p> <p>17 wrestling match does?</p> <p>18 A. I would expect so, yes.</p> <p>19 Q. You know because you played and watched,</p> <p>20 played the game and watched WWE, right?</p> <p>21 A. Yes.</p> <p>22 Q. In WWE 2K, you hear cheering crowds?</p> <p>23 A. Yes, sometimes.</p> <p>24 Q. Sometimes booing crowds?</p> <p>25 A. Yes, yes.</p>	<p>1 A. So player habits are complicated and</p> <p>2 surprising sometimes. And the reason I'm hedging is</p> <p>3 I can't say how everyone plays WWE. And from</p> <p>4 knowledge from other games, I think it is possible</p> <p>5 that some people might play WWE without playing a</p> <p>6 wrestler.</p> <p>7 Q. And what would they be doing?</p> <p>8 A. They might just be watching, and they</p> <p>9 would consider that playing. They might just be</p> <p>10 engaging with the wrestler-creation mode, but not</p> <p>11 actually controlling the wrestler. Things of that</p> <p>12 sort.</p> <p>13 Q. The focus of WWE 2K is on playing as a</p> <p>14 wrestler in a wrestling ring?</p> <p>15 A. Yes, I would say that is the expected</p> <p>16 experience.</p> <p>17 Q. And you have played WWE 2K and in the</p> <p>18 wrestling ring?</p> <p>19 A. Yes, I have played it that way.</p> <p>20 Q. What character did you choose?</p> <p>21 A. The last time I played?</p> <p>22 Q. Uh-huh.</p> <p>23 A. The last time I played I made my own</p> <p>24 character.</p> <p>25 Q. Okay. What did you do to create your own</p>
Page 75	Page 77
<p>1 Q. And the crowd responses are similar to</p> <p>2 those you would hear in a real WWE wrestling match,</p> <p>3 right?</p> <p>4 A. Yes.</p> <p>5 Q. There are buzzers in WWE 2K?</p> <p>6 A. I believe so.</p> <p>7 Q. And the same buzzers you would hear in a</p> <p>8 WWE wrestling match, right?</p> <p>9 A. I would assume.</p> <p>10 Q. And there are announcements in WWE 2K?</p> <p>11 A. You mean separate from announcers or --</p> <p>12 Q. There are announcements. The announcers</p> <p>13 are making announcements, I guess is the right way?</p> <p>14 A. Yes, I would expect announcers to make</p> <p>15 announcements.</p> <p>16 Q. Similar to announcements you hear in WWE</p> <p>17 wrestling, right?</p> <p>18 A. I would expect them to, yes.</p> <p>19 Q. And when you play WWE 2K, you play as a</p> <p>20 wrestler, right?</p> <p>21 A. When I play personally?</p> <p>22 Q. Yes. Or when one plays?</p> <p>23 A. Usually I would say yes.</p> <p>24 Q. Is there a way to play WWE 2K as something</p> <p>25 other than a wrestler?</p>	<p>1 character?</p> <p>2 A. I used the tools provided by the game.</p> <p>3 Q. Did you scan your face into the game?</p> <p>4 A. No, I did not.</p> <p>5 Q. You know that when you create your own</p> <p>6 character, you can select various features, right?</p> <p>7 A. Yes.</p> <p>8 Q. And one of those features is the body type</p> <p>9 of a character?</p> <p>10 A. Uh-huh. Broadly speaking, yes.</p> <p>11 Q. And hair?</p> <p>12 A. I would say hairstyle. I don't remember</p> <p>13 what the menu items are called in the game, but yes,</p> <p>14 items referring to the hair, yes.</p> <p>15 Q. And you can also put tattoos on the custom</p> <p>16 character in WWE 2K?</p> <p>17 A. Yes.</p> <p>18 Q. You would agree that they're not the</p> <p>19 tattoos which appear on the real-life wrestler,</p> <p>20 right?</p> <p>21 A. I do not know.</p> <p>22 Q. You don't know either way?</p> <p>23 A. I'm not familiar with all of the tattoos</p> <p>24 all the wrestlers in WWE have, so I can't say if a</p> <p>25 specific tattoo you could put to your own character</p>

<p style="text-align: right;">Page 78</p> <p>1 is or is not from a specific wrestler on the WWE 2 roster. 3 Q. Are you aware of whether any of the 4 tattoos asserted in this case are available to place 5 onto custom characters in WWE 2K? 6 A. I'm not aware. 7 Q. Did you investigate that? 8 A. No, not specifically. 9 Q. Now, have you ever played a wrestler in 10 WWE 2K other than a custom wrestler? 11 A. Yes. 12 Q. What wrestler did you play as? 13 A. I think I played Randy Orton. 14 Q. Have you played as any other wrestler? 15 A. Yes. 16 Q. Which wrestler? 17 A. I don't recall the other wrestlers I 18 played as. 19 Q. Do you remember any of them? 20 A. Brock Lesnar. 21 Q. I'm sorry, I missed that. What did you 22 say? 23 A. Brock Lesnar, I think it was. 24 Q. Anything else? 25 A. I don't recall.</p>	<p style="text-align: right;">Page 80</p> <p>1 report, so when I played the games -- sorry. As I 2 mentioned earlier that I played some of the games 3 for my report, it would be at that moment. 4 Q. And when you selected Randy Orton as a 5 character, that was also in preparing your report, 6 right? 7 A. Yes. 8 Q. Do you remember the name of any character 9 you played in WWE 2K prior to preparation of your 10 report? 11 A. I'm thinking of all the times I played the 12 game in the past. So The Rock, The Undertaker, 13 Mankind, Triple H, and some others. I think those 14 would be the ones that sort of are at the top of my 15 head. 16 Q. And those are popular wrestlers, right? 17 A. I think so. 18 Q. The Rock is now a movie celebrity, right? 19 A. Yes. 20 Q. His fame has gone beyond just wrestling to 21 being an actor and spokesperson, true? 22 A. Yes. He has an out-of-wrestling fame, 23 yes. 24 Q. And The Undertaker is one of the classic 25 villains of WWE wrestling, right?</p>
<p style="text-align: right;">Page 79</p> <p>1 Q. Why did you choose Brock Lesnar? 2 A. I was just curious to see how he behaved 3 in the game. 4 Q. Were you familiar with him from watching 5 WWE wrestling? 6 A. I would say vaguely. 7 Q. Is that why you knew what -- you were 8 comparing what they looked like in real life to how 9 he played in the game? 10 A. So I wanted to try different wrestlers 11 just to see if they behaved differently from each 12 other. 13 Q. And do they? 14 A. I would say broadly speaking, yes, or you 15 can -- so they have different special moves, and so, 16 in that sense, yes. 17 Q. And when you were playing as Brock Lesnar, 18 when was that? 19 A. The date, I do not recall. 20 Q. Was that within the last year? 21 A. Yes. 22 Q. Was that in preparation for your testimony 23 in this case? 24 A. I think it was in preparation -- so when I 25 mentioned that I played the games for writing my</p>	<p style="text-align: right;">Page 81</p> <p>1 A. I believe so. 2 Q. And the same is true for Mankind and 3 Triple H, they are well-known wrestlers, right? 4 A. I don't know how well-known they are 5 nowadays. I know they were well-known and popular, 6 I would say, before or... 7 Q. When you're playing WWE 2K, the players 8 move around the ring, right? 9 A. Yes. Sometimes outside the ring, too. 10 Q. They may pick up a table and hit each 11 other, right? 12 A. Yes. 13 Q. And when they are grappling, they move 14 quickly, right? 15 A. What do you mean by "quickly"? 16 Q. Faster than slow. 17 A. So I would say they generally move the way 18 they move in the show. 19 Q. And they move around each other, right? 20 A. Yes. 21 Q. They tackle each other? 22 A. Yes, sometimes. 23 Q. They grapple with each other? 24 A. Yes. 25 Q. They use wrestling moves on each other?</p>

21 (Pages 78 to 81)

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<p>1 A. Yes.</p> <p>2 Q. They use props in the ring against each</p> <p>3 other?</p> <p>4 A. Sometimes, yes.</p> <p>5 Q. They try to knock each other down?</p> <p>6 A. Yes, generally speaking.</p> <p>7 Q. And they try to beat each other to the</p> <p>8 ground, too?</p> <p>9 A. They wrestle with each other is what I</p> <p>10 would say.</p> <p>11 Q. They wrestle each other to the ground?</p> <p>12 A. Sure, sometimes they are on the mat, yes.</p> <p>13 Q. And the goal of the wrestlers in the game</p> <p>14 is to win a match, right?</p> <p>15 A. Yes.</p> <p>16 Q. So the mechanics of the game are just like</p> <p>17 the real-world WWE wrestling matches, right?</p> <p>18 A. On the surface, yes.</p> <p>19 Q. And why do you qualify that with "on the</p> <p>20 surface"?</p> <p>21 A. So when I'm watching a wrestling match on</p> <p>22 the television, the fantasy of the wrestling match</p> <p>23 is that the -- let's say there's only two wrestlers.</p> <p>24 Both wrestlers are trying to win. The reality is</p> <p>25 that the match might be -- the outcome of the match</p>	<p>1 A. Yes.</p> <p>2 Q. And you have played the story mode, true?</p> <p>3 A. That is one mode I have played, yes.</p> <p>4 Q. And that is called My Career?</p> <p>5 A. I don't recall exactly what it's called.</p> <p>6 Q. But the story mode has a narrative</p> <p>7 structure, true?</p> <p>8 A. Yes.</p> <p>9 Q. And it takes you as a fictional character</p> <p>10 from high school to college to professional</p> <p>11 wrestling, right?</p> <p>12 A. I don't know if it takes you. I don't</p> <p>13 recall it taking you from high school.</p> <p>14 Q. It takes you from being a young person?</p> <p>15 A. Young and new, from rookie to, let's say,</p> <p>16 seasoned pro, might be how I would characterize it,</p> <p>17 or newcomer to superstar.</p> <p>18 Q. And in that story, there are scenes with</p> <p>19 the character's family, right?</p> <p>20 A. I don't recall seeing scenes of the</p> <p>21 character's family.</p> <p>22 Q. Are there scenes with the character's</p> <p>23 friends?</p> <p>24 A. I don't recall seeing scenes of the</p> <p>25 character's friends.</p>
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<p>1 might be predetermined, for example.</p> <p>2 So, in that sense, they are not</p> <p>3 necessarily wrestling to win like they might be if</p> <p>4 they're wrestling in the Olympics, where they want</p> <p>5 the gold medal, for example.</p> <p>6 Q. So when you are observing the wrestlers in</p> <p>7 WWE 2K, you would agree with me that any given</p> <p>8 wrestler's tattoos aren't always visible as you are</p> <p>9 watching the match, right?</p> <p>10 A. Yes, I think that's fair.</p> <p>11 Q. The tattoos aren't visible because things</p> <p>12 get in the way, right?</p> <p>13 A. Occasionally, they might not be visible</p> <p>14 because things get in the way, yes.</p> <p>15 Q. Other wrestlers get in the way of seeing</p> <p>16 the tattoos, right?</p> <p>17 A. Yes, for example.</p> <p>18 Q. Referees get in the way if they are</p> <p>19 standing between the wrestler and the camera, right?</p> <p>20 A. Yes.</p> <p>21 Q. The wrestler's own clothing might block</p> <p>22 the tattoo, right?</p> <p>23 A. Yes. Right.</p> <p>24 Q. Now, there are different modes in WWE 2K,</p> <p>25 right?</p>	<p>1 Q. And have you -- and you made various</p> <p>2 decisions along the way in the story mode, right?</p> <p>3 A. Some decisions were made along the way,</p> <p>4 yes.</p> <p>5 Q. Now, when you are playing WWE 2K -- I'm</p> <p>6 switching back to normal game mode -- not every</p> <p>7 wrestler will appear in the screen if they are not</p> <p>8 selected as one of the characters being played in</p> <p>9 the game, right?</p> <p>10 A. I think there's enough wrestlers, that</p> <p>11 having all of the wrestlers on the screen would be a</p> <p>12 bad design choice.</p> <p>13 Q. And it wasn't made here, right?</p> <p>14 A. I do not recall seeing a screen that had</p> <p>15 all of the wrestlers in the game on the screen at</p> <p>16 the same time.</p> <p>17 Q. So you wouldn't see a -- there may be</p> <p>18 wrestlers you would not see in playing through WWE</p> <p>19 2K?</p> <p>20 A. What do you mean?</p> <p>21 Q. Let me give you a specific example. If</p> <p>22 Randy Orton were not the character that you chose to</p> <p>23 play, and he wasn't your opponent, he wouldn't</p> <p>24 appear in the video game, right?</p> <p>25 A. In a specific case of WWE, I don't know.</p>

<p style="text-align: right;">Page 86</p> <p>1 It is my sense that some of the characters are 2 scripted to appear, and so some characters you might 3 have to face regardless. 4 Q. He wouldn't appear in every scene in the 5 game, right? He wouldn't be in every match? 6 A. Yes, he would not be in every match. 7 Q. So when he's not in the match, he's not on 8 the screen? 9 A. Correct. 10 Q. And when Randy Orton is in the game in the 11 match, you would agree that everything that we 12 talked about with regard to obstructions and not 13 seeing every part of the -- of Mr. Orton would be 14 true of him as well, right? 15 A. So if you mean if I'm playing with or 16 against Randy Orton in the game, are there moments 17 you don't see his tattoos, I would say that is 18 likely. 19 Q. It is true, isn't it? 20 A. Yes. 21 Q. You wouldn't see all of Mr. Orton's 22 features at all times, right? 23 A. So as a player, if my goal was always to 24 see his tattoos, I might be able to accomplish that. 25 I would be surprised if there were moments in the</p>	<p style="text-align: right;">Page 88</p> <p>1 A. Hmm. Out of focus. I'm not sure, to be 2 honest, if that's part of the -- of that game. 3 Q. Are wrestlers sometimes out of focus in 4 real-world WWE? 5 A. I would say yes. Well, hmm. Yes. 6 Probably. 7 Q. Would you expect WWE 2K to have wrestlers 8 that were out of focus at times in the game? 9 A. Yes. 10 Q. And sometimes Mr. Orton will be blurred as 11 he's moving around the screen, right? 12 A. Yes. Perhaps. 13 MR. SIMMONS: We've been going for an hour 14 and 45 minutes, let's take a break so the court 15 reporter can rest. 16 THE VIDEOGRAPHER: We are going off the 17 record at 9:46 a.m. 18 (Thereupon, a recess was taken, after 19 which the following proceedings were held:) 20 THE VIDEOGRAPHER: This is the beginning 21 of DVD 3. We are back on the record at 22 9:59 a.m. 23 BY MR. SIMMONS: 24 Q. Dr. Zagal, do you have any tattoos? 25 A. No.</p>
<p style="text-align: right;">Page 87</p> <p>1 game -- I would be surprised if sometimes if -- if 2 his tattoos appeared all the time. 3 Q. And he's a three-dimensional character in 4 a two-dimensional world, right, in the game? 5 A. That's a tricky one. 6 Q. I guess what -- maybe I can simply this. 7 When Randy Orton is facing the camera in 8 the video game, you wouldn't see his back, right? 9 A. Correct. 10 Q. So at any given moment, you're not going 11 to see all sides of his body? 12 A. There are moments, yes, you would not see 13 all of him in his entirety. 14 Q. And would you agree that the fact that 15 tattoos are obstructed from the user's view is part 16 of the realism of WWE 2K? 17 A. If you saw all of Randy all of the time, I 18 would say that would not -- that would not be 19 realistic, because that's not how we see people in 20 the real world. I don't see your back right now. 21 Q. Is that a yes? 22 A. Yes, I would say it is realistic not to 23 see him all the time. 24 Q. And in WWE 2K, sometimes Mr. Orton will be 25 out of focus, right?</p>	<p style="text-align: right;">Page 89</p> <p>1 Q. Do any of your family members have 2 tattoos? 3 A. Not that I'm aware of. 4 Q. Have you ever studied tattoos other than 5 in connection with this case? 6 A. I have not studied tattoos in the general 7 sense, no. 8 Q. Have you studied them in a specific sense? 9 A. Well, as related to this case, yes. 10 Q. Other than in relation to this case, you 11 are not a tattoo expert, right? 12 A. I would not consider myself an expert in 13 tattoos. 14 Q. Have you studied IP licenses academically? 15 A. Intellectual property licensing 16 specifically, I have read things, yes, but I haven't 17 read such articles on that. 18 Q. You are not an intellectual property 19 licensing expert, right? 20 A. No. 21 Q. And are you familiar with the tattoos that 22 are at issue in this case? 23 A. In the general sense, yes. 24 Q. Have you reviewed them? 25 A. You mean looked at pictures of them?</p>

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<p>1 Q. Sure.</p> <p>2 A. Yes.</p> <p>3 Q. Have you looked at them in real life?</p> <p>4 A. No.</p> <p>5 Q. You know that the tattoos were created as</p> <p>6 custom tattoos, right?</p> <p>7 A. I'm not familiar with the specifics of how</p> <p>8 the tattoos were created.</p> <p>9 Q. You know they were inked on Randy Orton,</p> <p>10 right?</p> <p>11 A. Yes.</p> <p>12 Q. And you're not aware of someone else who</p> <p>13 has those tattoos?</p> <p>14 A. I'm not aware of other people having the</p> <p>15 same tattoos as Randy Orton has.</p> <p>16 Q. Mr. Orton is a professional wrestler,</p> <p>17 right?</p> <p>18 A. That is my understanding.</p> <p>19 Q. And his tattoos are an expression of his</p> <p>20 identity, correct?</p> <p>21 MR. FRIEDMAN: Object to form.</p> <p>22 THE WITNESS: They are part of his</p> <p>23 identity, yes.</p> <p>24 BY MR. SIMMONS:</p> <p>25 Q. They express his identity, don't they?</p>	<p>1 any facts provided to you by Ms. Alexander?</p> <p>2 A. Provided to me directly by Ms. Alexander?</p> <p>3 Q. Or indirectly.</p> <p>4 A. So, yes, I'm aware that Ms. Alexander is</p> <p>5 filing suit about the tattoos, so, with that, yes.</p> <p>6 Q. Any other facts that were communicated to</p> <p>7 you directly or indirectly by Ms. Alexander?</p> <p>8 A. I think the materials I was provided made</p> <p>9 reference to aspects of Ms. Alexander. In that</p> <p>10 sense, yes.</p> <p>11 Q. When you say "the materials that you were</p> <p>12 provided," do you mean the materials cited in your</p> <p>13 expert report?</p> <p>14 A. For example, yes.</p> <p>15 Q. Are there materials that you were provided</p> <p>16 that were not listed in your expert report?</p> <p>17 A. Well, yes.</p> <p>18 Q. What materials were you provided in this</p> <p>19 case that were not part of your expert report and</p> <p>20 that form -- that provided you facts about this</p> <p>21 case?</p> <p>22 A. So I believe my report does not cite</p> <p>23 the -- I don't know what the technical term is --</p> <p>24 what the case -- the complaint, I believe it's</p> <p>25 called.</p>
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<p>1 A. I would say broadly speaking, yes.</p> <p>2 Q. And they are part of his personal</p> <p>3 expression, true?</p> <p>4 MR. FRIEDMAN: Objection, calls for</p> <p>5 speculation.</p> <p>6 THE WITNESS: Broadly speaking, yes.</p> <p>7 BY MR. SIMMONS:</p> <p>8 Q. And professional wrestlers do their</p> <p>9 wrestling in public, right?</p> <p>10 A. Well, what do you mean by "public"?</p> <p>11 Q. Not that -- in a way that members of the</p> <p>12 public can see.</p> <p>13 A. Yes.</p> <p>14 Q. And you would agree with me that</p> <p>15 Ms. Alexander knew that Mr. Orton would appear in</p> <p>16 public when the tattoos were inked, right?</p> <p>17 A. I have no idea what relationship</p> <p>18 Ms. Alexander had with Randy Orton, if she knew who</p> <p>19 he was or not; I don't know.</p> <p>20 Q. You haven't spoken to her about it?</p> <p>21 A. I have not spoken to her.</p> <p>22 Q. Did you review her transcript in this</p> <p>23 case?</p> <p>24 A. Ah, no.</p> <p>25 Q. Is your testimony in this case based on</p>	<p>1 Q. Uh-huh.</p> <p>2 A. I believe I was provided with a copy of</p> <p>3 the complaint.</p> <p>4 Q. Are there any other materials that you</p> <p>5 were provided in this case that are not cited in</p> <p>6 your expert report and that provided you facts about</p> <p>7 this case?</p> <p>8 A. I was provided other materials that were</p> <p>9 not cited in my report, yes, such as materials that</p> <p>10 came up in discovery that I did not cite. There</p> <p>11 were a lot of materials that were provided in</p> <p>12 discovery.</p> <p>13 Q. Any other materials?</p> <p>14 A. I don't think so.</p> <p>15 Q. And the materials that you were provided</p> <p>16 but didn't cite in your report, you are not relying</p> <p>17 on them for your opinions, right?</p> <p>18 A. I reviewed all of the materials I was</p> <p>19 provided, and so, in that sense, my opinion is based</p> <p>20 on all of the materials. I could have cited more</p> <p>21 materials than I did.</p> <p>22 Q. So are you telling me that you have</p> <p>23 opinions in this case that are based on materials</p> <p>24 that were not cited in your report?</p> <p>25 MR. FRIEDMAN: Objection. That</p>

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<p>1 mischaracterizes his testimony. To the extent 2 that you want to review your report to see what 3 you cited, Dr. Zagal, you are welcome to ask 4 for that. You shouldn't necessarily speculate. 5 If that would assist you. 6 MR. SIMMONS: Counsel, you're coaching the 7 witness. 8 MR. FRIEDMAN: I'm not coaching him. I'm 9 letting him know that he can review his report. 10 It seems like he's struggling to recall what is 11 cited in the report. 12 BY MR. SIMMONS: 13 Q. Dr. Zagal, are you telling me that you 14 have opinions in this case that were based on 15 materials not cited in your report? 16 MR. FRIEDMAN: Same objections. 17 THE WITNESS: So I would say that my 18 opinion is holistic, in the sense I looked at 19 all of the materials. For some materials, some 20 specific materials, I might have an opinion on 21 specific materials. 22 But I don't think I could -- I don't think 23 I could say that -- let's imagine I only looked 24 at, let's say, five materials and only cited 25 one, for example's sake. I don't think anyone</p>	<p>1 and answered. 2 THE WITNESS: Yes, in the sense that I 3 didn't cite everything. 4 BY MR. SIMMONS: 5 Q. Do you know anything about when the 6 tattoos in this case were created? 7 A. Now that you mention it, I believe that 8 some of the materials might have had those dates. I 9 don't recall what those dates were. 10 Q. You don't know the answer one way or the 11 other sitting here now? 12 A. I could review those materials and say, 13 Oh, yes, the date was, in fact, in the filing of the 14 case. 15 Q. But you don't have any independent 16 knowledge of that, right? 17 A. No, I don't have any independent 18 knowledge. 19 Q. You don't know how the tattoos were 20 created, do you? 21 A. Not specifically, no. 22 Q. Do you know anything about the 23 conversations between Ms. Alexander and Mr. Orton 24 concerning the tattoos at issue in this case? 25 A. Other than what might have been in the</p>
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<p>1 could really attribute materials two, three, 2 four, and say this one played no role at all. 3 Just by looking at it, it plays some sort of 4 role. 5 BY MR. SIMMONS: 6 Q. There are materials not cited in your 7 report that you considered in reaching your opinions 8 in this case? 9 MR. FRIEDMAN: Same objections. 10 THE WITNESS: As I stated, I looked at all 11 the materials I was provided; in the case of 12 discovery, for example. And I did not cite all 13 of them, but I did look at all of them, in that 14 sense, for my opinion. 15 BY MR. SIMMONS: 16 Q. So is that a yes to my question? 17 MR. FRIEDMAN: Same objections. 18 THE WITNESS: Broadly speaking, my opinion 19 was informed by all of the materials I looked 20 at. 21 BY MR. SIMMONS: 22 Q. So there were materials that you 23 considered in reaching those opinions that are not 24 cited in your report, right? 25 MR. FRIEDMAN: Same objections and asked</p>	<p>1 materials I was provided with, no. 2 Q. And based on the materials, you would 3 agree that the tattoos were not created for the 4 purpose of being added to a video game, right? 5 MR. FRIEDMAN: Objection, calls for 6 speculation. 7 THE WITNESS: I have no idea what those 8 conversations might have been like. 9 BY MR. SIMMONS: 10 Q. But you would agree that the tattoos that 11 were inked on Randy Orton were not created for the 12 purpose of being placed in a video game, right? 13 A. I would presume so, yes. 14 Q. That is your understanding, isn't it? 15 A. That would be my understanding. 16 Q. Now, one of the topics we mentioned today, 17 and I just want to make sure that I understand it, 18 is realism in video games. 19 A. Uh-huh. 20 Q. And you have played WWE 2K, and you would 21 agree that the -- that its purpose is to reflect an 22 actual WWE wrestling match, right? 23 A. I think it is a fair characterization to 24 say that is more or less one of the purposes of the 25 game.</p>

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<p>1 Q. And WWE 2K is reflecting the experience of</p> <p>2 watching as a spectator from the stands, in terms of</p> <p>3 its camera depiction, right?</p> <p>4 A. Like, is it exactly the same? I don't</p> <p>5 know if it's exactly the same.</p> <p>6 Q. But it is similar?</p> <p>7 A. It is similar enough, yes.</p> <p>8 Q. Does using current wrestlers in WWE 2K,</p> <p>9 each version, make it more realistic?</p> <p>10 A. Broadly speaking, yes.</p> <p>11 Q. And you would agree that including</p> <p>12 Mr. Orton in WWE 2K serves the purpose of creating a</p> <p>13 more realistic game, right?</p> <p>14 A. Broadly speaking, yes.</p> <p>15 Q. And including his tattoos in WWE 2K also</p> <p>16 serves the purpose of creating a more realistic</p> <p>17 game, right?</p> <p>18 A. Broadly speaking, yes.</p> <p>19 Q. What do you mean by "broadly speaking"?</p> <p>20 A. I mean, in the sense that if -- if I</p> <p>21 purchased -- if I was -- if I purchased a WWE game,</p> <p>22 and I was familiar with Randy Orton, like I knew who</p> <p>23 he was as a wrestler, in the game he did not have</p> <p>24 his tattoos, I would surprised. My expectation</p> <p>25 would be he would appear in the game as he appears</p>	<p>1 creators of the game felt that their way to</p> <p>2 make the most money was to make the game more</p> <p>3 realistic.</p> <p>4 BY MR. SIMMONS:</p> <p>5 Q. I'm going to ask you, you are injecting</p> <p>6 this concept of the sale, which is not really the</p> <p>7 question I'm asking.</p> <p>8 A. Okay.</p> <p>9 Q. My question is whether the purpose of</p> <p>10 including Randy Orton with his tattoos in the game</p> <p>11 was to make the game more realistic?</p> <p>12 A. I don't think that's the only purpose, but</p> <p>13 I think it's one of the purposes, yes.</p> <p>14 Q. So one of the purposes of including Randy</p> <p>15 Orton with his tattoos in the game was to make the</p> <p>16 game more realistic, true?</p> <p>17 A. One of the purposes, yes.</p> <p>18 Q. Now, WWE 2K's realism applies to all</p> <p>19 aspects of the wrestlers in the game's appearance,</p> <p>20 right?</p> <p>21 A. What do you mean by "all aspects"?</p> <p>22 Q. So, wrestlers in the game have clothing,</p> <p>23 costumes, hair, facial features, voices, tattoos --</p> <p>24 A. Yes.</p> <p>25 Q. -- right?</p>
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<p>1 in real life.</p> <p>2 Q. I think we're talking -- I think that's a</p> <p>3 different perspective than my question.</p> <p>4 So when WWE 2K was being created, the</p> <p>5 purpose of the game was to include Randy Orton and</p> <p>6 his tattoos, for the purpose of making the game more</p> <p>7 realistic, right?</p> <p>8 A. I would say that overarching goal would be</p> <p>9 to create the -- I would imagine the creators of the</p> <p>10 game made the game to make money, as a business</p> <p>11 venture, and that including Orton was a way to</p> <p>12 achieve that goal, and including Orton's tattoos</p> <p>13 also was a way to achieve that goal.</p> <p>14 Q. But you also would agree with me that when</p> <p>15 WWE 2K was created, the purpose of including Randy</p> <p>16 Orton with his tattoos was to make the game more</p> <p>17 realistic, right?</p> <p>18 A. In order to make money, yes.</p> <p>19 Q. But you would agree that the purpose of</p> <p>20 including Randy Orton with his tattoos was to make</p> <p>21 the game more realistic, right?</p> <p>22 MR. FRIEDMAN: Asked and answered.</p> <p>23 THE WITNESS: I think an unrealistic game</p> <p>24 would not make as much money as they wanted to.</p> <p>25 Or let me rephrase. I would imagine that the</p>	<p>1 They have all those different</p> <p>2 characteristics?</p> <p>3 A. All of those things that you mentioned,</p> <p>4 yes.</p> <p>5 Q. So all of those different aspects of the</p> <p>6 wrestlers' appearance lead to the realism of WWE 2K?</p> <p>7 A. Are a contributing factor, yes.</p> <p>8 Q. And the garments and costuming elements in</p> <p>9 WWE 2K are realistic, right?</p> <p>10 A. To the best of my knowledge.</p> <p>11 Q. Mr. Orton wears the clothes he wears in</p> <p>12 real life?</p> <p>13 MR. FRIEDMAN: Objection to form.</p> <p>14 BY MR. SIMMONS:</p> <p>15 Q. Mr. Orton wears the clothes that he wears</p> <p>16 in WWE wrestling matches.</p> <p>17 MR. FRIEDMAN: Objection. Ambiguous as to</p> <p>18 what you're talking about.</p> <p>19 MR. SIMMONS: Everyone needs to let</p> <p>20 everyone object, so we'll try to do better</p> <p>21 about that for the court reporter.</p> <p>22 BY MR. SIMMONS:</p> <p>23 Q. So, for example, are you aware that</p> <p>24 Mr. Orton wears -- is known as The Viper?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 102</p> <p>1 Q. And he wears oftentimes a vest that</p> <p>2 actually has a viper on it, right?</p> <p>3 A. I have seen pictures of him with a vest,</p> <p>4 yes.</p> <p>5 Q. And he appears in that vest in WWE 2K,</p> <p>6 right?</p> <p>7 MR. FRIEDMAN: Objection, ambiguous. I</p> <p>8 guess I'll take -- I'm not clear whether you're</p> <p>9 talking about Randy Orton or the video game</p> <p>10 character or making a distinction here.</p> <p>11 BY MR. SIMMONS:</p> <p>12 Q. Mr. Orton appears in WWE 2K in the vest</p> <p>13 that he wears in WWE wrestling matches, right?</p> <p>14 A. I believe it is the Randy Orton character</p> <p>15 in the game that can wear a vest, sometimes appears</p> <p>16 wearing a vest.</p> <p>17 Q. And when he does, you can't see all of his</p> <p>18 tattoos, right?</p> <p>19 MR. FRIEDMAN: Objection.</p> <p>20 THE WITNESS: I think we've established</p> <p>21 that sometimes you don't see all of his</p> <p>22 tattoos.</p> <p>23 BY MR. SIMMONS:</p> <p>24 Q. Because the vest blocks his back, for</p> <p>25 example?</p>	<p style="text-align: right;">Page 104</p> <p>1 Q. Randy Orton's tattoos are part of his</p> <p>2 likeness, true?</p> <p>3 A. Correct.</p> <p>4 Q. You also believe it was important to</p> <p>5 capture real-life Mr. Orton in the video game</p> <p>6 version of Mr. Orton?</p> <p>7 A. What do you mean by "captured in real</p> <p>8 life"?</p> <p>9 Q. Is it your view that it is important that</p> <p>10 Mr. Orton look like he looks in real life in WWE 2K?</p> <p>11 A. Yes, I believe so.</p> <p>12 Q. So are you familiar, outside of this case,</p> <p>13 of the means by which real-world people are captured</p> <p>14 for inclusion in a video game?</p> <p>15 A. What do you mean by "capture"?</p> <p>16 Q. Image capturing.</p> <p>17 A. Yes, broadly speaking.</p> <p>18 Q. Have you studied it?</p> <p>19 A. Have I studied that specifically? Outside</p> <p>20 of the context of this case? A little bit, yes.</p> <p>21 Q. And have you done it? Have you actually</p> <p>22 photographed people to make realistic depictions of</p> <p>23 them in a video game?</p> <p>24 A. I have been on the other end of that. I</p> <p>25 have been captured, using your term.</p>
<p style="text-align: right;">Page 103</p> <p>1 A. If he was wearing this vest, you would not</p> <p>2 see his back.</p> <p>3 Q. And all of the elements of wrestling --</p> <p>4 strike that.</p> <p>5 Do you believe that the Defendants in this</p> <p>6 case included Mr. Orton's tattoos as faithfully as</p> <p>7 possible?</p> <p>8 MR. FRIEDMAN: Objection, ambiguous.</p> <p>9 THE WITNESS: What do you mean by</p> <p>10 "faithfully"?</p> <p>11 BY MR. SIMMONS:</p> <p>12 Q. Were they trying to make his tattoos look</p> <p>13 how they look in real life?</p> <p>14 A. I believe so, yes.</p> <p>15 Q. And do you believe that they accomplished</p> <p>16 that goal?</p> <p>17 A. I believe so, yes.</p> <p>18 Q. And the reason they did that was it was</p> <p>19 part of what Randy Orton looks like in real life,</p> <p>20 right?</p> <p>21 A. Yes, I believe so.</p> <p>22 Q. The Defendants in this case wanted</p> <p>23 Mr. Orton in WWE 2K to look like what Mr. Orton</p> <p>24 looks like in real life, right?</p> <p>25 A. I believe so, yes.</p>	<p style="text-align: right;">Page 105</p> <p>1 Q. When were you captured?</p> <p>2 A. Oh, God. The first time, I believe the</p> <p>3 first time was in 2007.</p> <p>4 Q. And why were you image-captured for</p> <p>5 inclusion in a video game?</p> <p>6 A. In this occasion, I was attending an</p> <p>7 academic conference called SIGGRAPH. It stands for</p> <p>8 Special Interest Group on Computer Graphics. So</p> <p>9 it's a computer science</p> <p>10 graphics/entertainment-related conference.</p> <p>11 And there were talks on the matter, I</p> <p>12 believe. I would have to go back and see the</p> <p>13 proceedings to be entirely sure. But I was captured</p> <p>14 at a booth they had set up for that purpose.</p> <p>15 Q. And do you remember whose booth it was?</p> <p>16 A. No, I don't remember.</p> <p>17 Q. And once they captured you, they created a</p> <p>18 version of you in a video game?</p> <p>19 A. No, not in a video game.</p> <p>20 Q. Oh, okay. Once they captured your image,</p> <p>21 what happened?</p> <p>22 A. I was provided with -- I don't remember.</p> <p>23 It was a link -- at the end, I was able to obtain a</p> <p>24 digital file that represented the capture. I don't</p> <p>25 remember if it was a link or USB drive or how it was</p>

<p style="text-align: right;">Page 106</p> <p>1 provided to me directly.</p> <p>2 Q. What kind of file was it?</p> <p>3 A. Oh, God. File format?</p> <p>4 Q. I just mean, were you placed into another</p> <p>5 setting? Was it just you in that setting, I mean,</p> <p>6 if it was just a photograph? I'm assuming it was</p> <p>7 more than just a three-dimensional photograph.</p> <p>8 A. It was not a photograph. It was a file</p> <p>9 containing information that could then be inputted</p> <p>10 into a specialized program in order to sort of</p> <p>11 appear on the screen, which could then be used.</p> <p>12 It was a file that I could have added to a</p> <p>13 video game if I wanted to, I guess would be a</p> <p>14 different way to describe it.</p> <p>15 Q. Did you do that?</p> <p>16 A. No.</p> <p>17 Q. Do you remember what kind of equipment was</p> <p>18 used to photograph you?</p> <p>19 A. The specific equipment? No.</p> <p>20 Q. So do you have an understanding of how</p> <p>21 wrestlers like Randy Orton were -- had their images</p> <p>22 captured for inclusion in WWE 2K?</p> <p>23 A. So I believe in my report, or maybe it was</p> <p>24 the supplemental report, I described the ways in</p> <p>25 which the process normally takes place. And I</p>	<p style="text-align: right;">Page 108</p> <p>1 it to a smaller, two-dimensional image, right?</p> <p>2 A. It is not necessarily that</p> <p>3 straightforward.</p> <p>4 Q. Is that a general summary?</p> <p>5 A. I think generally the process involves</p> <p>6 taking many pictures, and from those many pictures,</p> <p>7 generally speaking, at the very end of the process,</p> <p>8 many more files might be out there. It isn't like a</p> <p>9 one-to-one thing necessarily.</p> <p>10 Q. But in general, the process was that a</p> <p>11 three-dimensional, life-sized Randy Orton was</p> <p>12 converted into a smaller, two-dimensional set of</p> <p>13 images, right?</p> <p>14 MR. FRIEDMAN: Objection, asked and</p> <p>15 answered.</p> <p>16 THE WITNESS: Yes. I wouldn't say that</p> <p>17 Randy Orton was converted.</p> <p>18 BY MR. SIMMONS:</p> <p>19 Q. What would you say?</p> <p>20 A. I would say -- you could say that his</p> <p>21 image was recreated. You could say that his</p> <p>22 likeness was captured at one step in the process.</p> <p>23 You could say that -- you could say different</p> <p>24 things, I guess, depending on the specific process</p> <p>25 that was being used.</p>
<p style="text-align: right;">Page 107</p> <p>1 believe I described why I think one specific method</p> <p>2 might have been used in the case, based on the</p> <p>3 materials provided.</p> <p>4 Q. And is it your understanding that there</p> <p>5 are photographs taken of Mr. Orton's body from every</p> <p>6 angle to include him in the game?</p> <p>7 A. That was my understanding, based on the</p> <p>8 tools provided.</p> <p>9 Q. And when they did that, the photographs</p> <p>10 were processed digitally?</p> <p>11 A. I would imagine that they would be</p> <p>12 processed digitally.</p> <p>13 Q. That's how most photographs are processed</p> <p>14 today?</p> <p>15 A. Yes, yes, I would imagine.</p> <p>16 Q. Most people don't take film photographs</p> <p>17 for professional use any more, right?</p> <p>18 A. Yes, but there are also -- there are other</p> <p>19 methods that could have been used.</p> <p>20 Q. But here, image files were created that</p> <p>21 are photographs of Mr. Orton, right?</p> <p>22 A. I believe some of the materials that were</p> <p>23 provided were photographs of Mr. Orton.</p> <p>24 Q. And those image files of Mr. Orton take a</p> <p>25 three-dimensional, life-sized Randy Orton and reduce</p>	<p style="text-align: right;">Page 109</p> <p>1 But I think those two are broad enough</p> <p>2 that they would cover what I think was done in this</p> <p>3 case.</p> <p>4 Q. So would I be correct in saying that</p> <p>5 Mr. Orton's three-dimensional, life-sized person was</p> <p>6 reduced to a smaller, two-dimensional image?</p> <p>7 MR. FRIEDMAN: Objection, asked and</p> <p>8 answered.</p> <p>9 THE WITNESS: No, I wouldn't say that. I</p> <p>10 wouldn't say it was reduced to a smaller.</p> <p>11 BY MR. SIMMONS:</p> <p>12 Q. And would I be correct in saying that</p> <p>13 Mr. Orton's three-dimensional, life-sized person was</p> <p>14 recreated in a smaller, two-dimensional image?</p> <p>15 A. In a single sense, smaller,</p> <p>16 two-dimensional image, no.</p> <p>17 Q. Multiples?</p> <p>18 MR. FRIEDMAN: Objection, form.</p> <p>19 THE WITNESS: I would say that as part of</p> <p>20 the process, there would be multiple</p> <p>21 two-dimensional images resulting. But only</p> <p>22 part of it.</p> <p>23 BY MR. SIMMONS:</p> <p>24 Q. At a general level, the three-dimensional,</p> <p>25 life-sized Randy Orton is recreated in smaller,</p>

<p style="text-align: right;">Page 110</p> <p>1 two-dimensional images, right?</p> <p>2 MR. FRIEDMAN: Objection, asked and</p> <p>3 answered, form.</p> <p>4 THE WITNESS: So the Randy Orton in the --</p> <p>5 the character Randy Orton in the game is not</p> <p>6 exclusively a two-dimensional image.</p> <p>7 BY MR. SIMMONS:</p> <p>8 Q. It is on the screen, though, right?</p> <p>9 A. What you see on the screen is a</p> <p>10 two-dimensional image, yes.</p> <p>11 Q. So in this process, you go from a</p> <p>12 three-dimensional, life-sized Randy Orton to a</p> <p>13 screen version of Randy Orton that is smaller and</p> <p>14 two-dimensional, right?</p> <p>15 MR. FRIEDMAN: Objection, asked and</p> <p>16 answered, and to the form of the question.</p> <p>17 THE WITNESS: There might be -- it might</p> <p>18 be smaller. That would depend on the size of</p> <p>19 your output screen. And we play video games</p> <p>20 on stadium jumbotrons, so it can get pretty</p> <p>21 crazy.</p> <p>22 I would say at the very end, what the</p> <p>23 player sees is a two-dimensional image on a</p> <p>24 screen, which has to be two-dimensional because</p> <p>25 the screen is two-dimensional.</p>	<p style="text-align: right;">Page 112</p> <p>1 A. Yes.</p> <p>2 Q. There is a real-life human person who is</p> <p>3 three-dimensional, right?</p> <p>4 A. Yes.</p> <p>5 Q. And at the end of the process, you get</p> <p>6 a --</p> <p>7 A. At the end of what process?</p> <p>8 Q. Then when you play WWE 2K --</p> <p>9 A. Okay.</p> <p>10 Q. -- you play it on a two-dimensional</p> <p>11 screen, right?</p> <p>12 A. Yes.</p> <p>13 So the player on one end plays a game</p> <p>14 generally on a two-dimensional screen, yes.</p> <p>15 Q. Okay.</p> <p>16 A. And there's a real, life-sized Randy</p> <p>17 Orton. He's his own real life -- yes.</p> <p>18 Q. The size of the images that are taken in</p> <p>19 this process are compressed to use less memory,</p> <p>20 right?</p> <p>21 MR. FRIEDMAN: Object to form.</p> <p>22 THE WITNESS: What do you mean by "size"?</p> <p>23 BY MR. SIMMONS:</p> <p>24 Q. The size. The file size. The actual</p> <p>25 number of bits used to depict him is compressed into</p>
<p style="text-align: right;">Page 111</p> <p>1 BY MR. SIMMONS:</p> <p>2 Q. Is that a yes?</p> <p>3 A. It may be smaller; it may be larger.</p> <p>4 Q. So other than based on the size of the</p> <p>5 screen you're looking at, is that a yes to my</p> <p>6 question?</p> <p>7 A. Can you restate the question, then?</p> <p>8 Q. In the process, you go from a</p> <p>9 three-dimensional, life-sized Randy Orton to a</p> <p>10 version of Randy Orton that is two-dimensional,</p> <p>11 right?</p> <p>12 MR. FRIEDMAN: Same objections.</p> <p>13 THE WITNESS: No.</p> <p>14 BY MR. SIMMONS:</p> <p>15 Q. You go from a three-dimensional,</p> <p>16 life-sized Randy Orton to a screen version of Randy</p> <p>17 Orton that is two-dimensional, right?</p> <p>18 MR. FRIEDMAN: Same objections.</p> <p>19 THE WITNESS: So I'm getting a bit</p> <p>20 confused on what you mean by "process." We</p> <p>21 were talking about the process -- I guess, what</p> <p>22 process are you talking about?</p> <p>23 BY MR. SIMMONS:</p> <p>24 Q. The process of taking Randy Orton from</p> <p>25 real life to WWE 2K. Okay?</p>	<p style="text-align: right;">Page 113</p> <p>1 a smaller file size, yes?</p> <p>2 A. Generally, yes.</p> <p>3 Q. You're familiar with image compression,</p> <p>4 generally, yes?</p> <p>5 A. Yes.</p> <p>6 Q. And you understand that you can take a</p> <p>7 higher-resolution image, and using an algorithm,</p> <p>8 reduce it in resolution to a smaller image that</p> <p>9 takes up less space in a hard drive, right?</p> <p>10 A. So you're mixing two things: resolution</p> <p>11 and file size. There's a strong correlation between</p> <p>12 them, but it also depends on file format and a bunch</p> <p>13 of other things.</p> <p>14 Q. But --</p> <p>15 A. Can you take a high-resolution picture and</p> <p>16 from that create a lower-resolution picture? Yes.</p> <p>17 Can you take a large file size -- a picture that has</p> <p>18 a large file size and create a version of that</p> <p>19 picture which has a smaller file size, yes.</p> <p>20 Q. And you would agree that when you compress</p> <p>21 an image, you are going to lose information along</p> <p>22 the way, right? That's the purpose of the -- strike</p> <p>23 that.</p> <p>24 You would agree that in a process of</p> <p>25 compression, one of the things that happens is that</p>

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1 you are losing information about that photograph
2 along the way, right?

3 A. Not necessarily. It depends on the
4 compression being used.

5 Q. Are you aware of any truly lossless
6 compression that exists on the market today?

7 A. It's complicated, because some formats
8 are, by definition, compressed and others aren't.
9 So there is such a thing as lossless compression,
10 yes.

11 Q. But for images is that the case?

12 A. I would imagine -- so you could apply
13 lossless compression to an image, so in that sense,
14 yes.

15 Q. But you would still have to lose image,
16 because an image has pixels at every point in the
17 image, right?

18 A. So an image file often has more
19 information than just the pixels.

20 Q. Right. I think what I'm saying is you can
21 have compression of an audio file, because some of
22 the sound -- there can be no sound at any given
23 point. You can take that information out and have
24 loss of compression. You can't do that with an
25 image, right?

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1 A. Yes, you could.

2 Q. Okay. How could you do that?

3 A. So let's say I have an image which is 500
4 pixels by 500 pixels, and each of those pixels is
5 red, the same color red. So I could encode that as
6 a header that says, Hey, this image has these
7 dimensions, and then here's the color information
8 for each of those pixels, okay?

9 I could say also say, Hey, this image has
10 500 -- has this many pixels. All of the pixels are
11 red.

12 That would take up less space -- I could
13 encode that using less space, but the information
14 would be -- if I needed to then display that image,
15 I could display -- both images would be displayed
16 exactly the same.

17 Q. You'd have to give an example of where
18 there's one or very few colors on the screen; you
19 wouldn't be dealing with a realistic photograph,
20 right?

21 A. That was a very simple example that I came
22 up with.

23 Q. Let me ask you this: You would agree that
24 the image files from Mr. Orton's tattoos are a small
25 part of WWE 2K's overall size in a video game,

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1 right?

2 A. By "size," you mean file size?

3 Q. Yes.

4 A. I don't know how much file space is taken
5 up by the images in the game.

6 Q. There is no way that these tattoos are
7 more than a small part of this overall video game,
8 right?

9 A. Are they -- I would be very surprised if
10 the image information connected to the tattoos took
11 up a significant amount of process. I would be
12 surprised.

13 Q. You know that they don't, right?

14 A. I don't know for sure. I haven't examined
15 the files.

16 Q. You have no opinions about the actual file
17 size of the tattoos in this case?

18 A. I can speculate.

19 Q. You don't have an opinion about it that
20 you're providing in this case?

21 A. I don't believe my report goes to what the
22 file size is.

23 Q. Would you agree that the resolution of the
24 tattoos in WWE 2K is lower than what you would see
25 in real life?

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1 A. People don't talk about real life in terms
2 of resolution.

3 Q. But would you agree with that statement?

4 A. No. I think it mischaracterizes what
5 resolution is.

6 Q. Okay. So if I wanted to express the fact
7 that in an image of a photograph of the real world
8 you're not going to get the same quality as you
9 would see with your own human eyes -- you have 20/20
10 vision --

11 A. I don't, actually.

12 Q. I don't either.

13 But how would you express that difference
14 from a technological point of view?

15 A. So I think a layperson would say, Is this
16 image indistinguishable from the real world? And I
17 don't think you need a technical understanding of
18 how the image was created or encoded or formatted to
19 make that determination.

20 And I think in the broad sense, some
21 people are more sensitive to those things than other
22 people.

23 Q. And you would agree that some
24 photographs -- some images of the real world are
25 more distinguishable -- indistinguishable in the

30 (Pages 114 to 117)

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<p>1 real world than others, right?</p> <p>2 A. Yes.</p> <p>3 Q. Because their quality is lower? Or other</p> <p>4 factors?</p> <p>5 A. It could be a bunch of factors.</p> <p>6 Q. How would you describe that difference,</p> <p>7 from the most indistinguishable to a less</p> <p>8 indistinguishable image?</p> <p>9 A. That would depend on the image. You could</p> <p>10 say realism, you could say photo realism is a term</p> <p>11 that's used commonly. You could say verisimilitude</p> <p>12 as well.</p> <p>13 THE REPORTER: You could say?</p> <p>14 THE WITNESS: Photo realism. And</p> <p>15 verisimilitude and realism is what I think I</p> <p>16 said first.</p> <p>17 BY MR. FRIEDMAN:</p> <p>18 Q. So would you agree that the appearance of</p> <p>19 the tattoos in WWE 2K has a lower photo realism than</p> <p>20 they do in real life?</p> <p>21 MR. FRIEDMAN: Object to form.</p> <p>22 THE WITNESS: So I think it's -- I think</p> <p>23 it's a bit tricky, because when you say "real</p> <p>24 life," I'm not sure if you mean if Randy Orton</p> <p>25 walked in right now, and I got to see him with</p>	<p>1 So my question is, you know, how would you</p> <p>2 describe the difference between in-person real-world</p> <p>3 viewing of an object on the high end, to the</p> <p>4 lower-end resolution photograph?</p> <p>5 MR. FRIEDMAN: Objection, form.</p> <p>6 THE WITNESS: So that is a</p> <p>7 context-sensitive question. And let me</p> <p>8 explain.</p> <p>9 Also, I imagine I'm playing the WWE game</p> <p>10 on a PlayStation 1, using a TV screen of the</p> <p>11 kind that was commonly available in those days,</p> <p>12 and I'm playing this game with some buddies,</p> <p>13 and I might say, Oh, my God, this looks so</p> <p>14 real.</p> <p>15 By today's standards, in terms of quality</p> <p>16 of graphics and quality of television screens,</p> <p>17 and so on, we would look back at that footage</p> <p>18 and say, Oh, my God, that does not look very</p> <p>19 real. But at that moment in time, we would</p> <p>20 say, Oh, that looks so real.</p> <p>21 And we would be making that -- we would</p> <p>22 comment on that sort of -- we would make that</p> <p>23 off-the-cuff comment based on what the</p> <p>24 expectations were of how characters should look</p> <p>25 in the game at that time, right?</p>
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<p>1 my own eyes, and he didn't have a shirt on, and</p> <p>2 I could see all of his tattoos, versus what I</p> <p>3 see on the television screen.</p> <p>4 BY MR. SIMMONS:</p> <p>5 Q. Well, I guess what I'm trying to</p> <p>6 distinguish is not -- it's not that. I'm trying to</p> <p>7 figure out how you would describe the difference</p> <p>8 between seeing him in real life in different -- what</p> <p>9 I would call the quality of photographs.</p> <p>10 In other words, they are going to be -- in</p> <p>11 my world, there are higher-resolution photographs</p> <p>12 and there are lower-resolution photographs, and the</p> <p>13 lower-resolution photograph won't look as much like</p> <p>14 the real world. It's grainy or other</p> <p>15 characteristics than a higher-resolution photograph.</p> <p>16 But you didn't -- you found it difficult to talk</p> <p>17 about that over to the real-world example.</p> <p>18 A. Well, because --</p> <p>19 Q. I'm trying to go from the real world,</p> <p>20 let's say, is a perfect resolution, to that scale,</p> <p>21 and I'm not sure how you --</p> <p>22 A. By "real world," you mean in person?</p> <p>23 Q. In person. I'm trying to understand how</p> <p>24 you would scale from the real world to this concept</p> <p>25 of the -- of resolution in the image world.</p>	<p>1 So does it look better than the previous</p> <p>2 game? Does it look more like the real world or</p> <p>3 expectations of the real world in the previous</p> <p>4 game?</p> <p>5 Nowadays, if I had to describe, let's say,</p> <p>6 the last game that came out, I would probably</p> <p>7 say and compare that to, I met Randy Orton in</p> <p>8 his office. Of course, I may say, Wow, that</p> <p>9 looks really good in the game. Then I might</p> <p>10 pick up on things that might not look so good.</p> <p>11 So, yeah, he looks really good in the</p> <p>12 game, but, actually, you know, his lips don't</p> <p>13 move like the way they did as when I met him.</p> <p>14 BY MR. SIMMONS:</p> <p>15 Q. What would you call that difference</p> <p>16 between the appearance in the game and the real</p> <p>17 world? Is there a sliding scale term that we could</p> <p>18 use to describe that difference?</p> <p>19 A. I would say the common-use term might be</p> <p>20 "realistic graphics."</p> <p>21 Q. Right.</p> <p>22 Would you use the term "realistic</p> <p>23 graphics" in comparison to the real world, meeting</p> <p>24 him in real life?</p> <p>25 A. That's a tough one. In the context of</p>

<p style="text-align: right;">Page 122</p> <p>1 games, I guess it's just a sense of these graphics 2 are more realistic, in the sense that they are 3 better than what previously existed before, like the 4 previous game. It looks better than before. 5 Q. I care less about the previous-game part 6 of this discussion and more trying to figure out, 7 from seeing him in real life into the video games, 8 is there a way I can describe that from -- in a sort 9 of sliding scale, getting closer and closer to real 10 life, getting comfortable with. 11 Graphic realism is fine with me, if you 12 think that you can make that connection. I'm not 13 sure that -- 14 A. So if you ask me if I can -- 15 MR. FRIEDMAN: I'm sorry. Objection, 16 asked and answered, and now argumentative. 17 THE WITNESS: If you're asking me whether 18 I could comment on the experience of seeing him 19 in the video game and seeing him in real life, 20 and -- and how different or similar that 21 experience might be, then yes, I believe I 22 could. 23 BY MR. SIMMONS: 24 Q. But would you describe that as graphic 25 realism? He looks more graphically realistic in</p>	<p style="text-align: right;">Page 124</p> <p>1 yet. There are still advances. Thus, I believe 2 that in the future, WWE games that may be in 3 development, that the graphics would be more 4 realistic, in the sense that the character, Randy 5 Orton, in the game becomes more indistinguishable, 6 perhaps, from Randy Orton, the human being. 7 Q. Is it fair to say there's a ways to go 8 before the graphics of WWE 2K look indistinguishable 9 from Randy Orton in real life? 10 A. Yes, I would say. 11 Q. Are you familiar with Photoshop? 12 A. Yes. 13 Q. It's a program for photo editing? 14 A. I am familiar with Photoshop, the program. 15 Q. And professional photography is often 16 Photoshopped, to use the verb? 17 A. Photoshop is a tool that is commonly used 18 by photographers, yes, is my understanding. 19 Q. Professional photographs are touched up 20 before they are used? 21 A. It is my understanding, yes, but I'm not 22 an expert photographer. 23 Q. But you understand that with professional 24 photographs, blemishes are often removed as part of 25 the editing process?</p>
<p style="text-align: right;">Page 123</p> <p>1 real life than in the video game? 2 A. I don't think I would say he looks more 3 realistic in real life. 4 Q. Well, that's my problem. I'm trying to 5 figure out what terminology you would use to make 6 that comparison between how realistic someone looks 7 like in real life and what they look like in the 8 video game, presumably -- 9 A. Well, you could say the graphics look more 10 realistic. But that's a -- I don't think there's an 11 objective scale for that, is my point. 12 Q. Let me ask it -- maybe this answers the 13 question. 14 Would you agree that -- that Randy Orton 15 in the video game, the graphic realism is not as 16 realistic as it could be? 17 A. I could imagine the graphics being better 18 and more realistic, yes. 19 Q. And they could be -- the graphics in the 20 video game could be more realistic and look more 21 like what he would look like if you were standing 22 with him today? 23 A. So the broader point is are video game 24 graphics getting better and more realistic over the 25 years? I would say yes. They have not plateaued</p>	<p style="text-align: right;">Page 125</p> <p>1 A. As a layperson, I have that understanding, 2 yes. 3 Q. And distortions in images are fixed? 4 A. Yes, they might be. 5 Q. And photographs taken and edited may be 6 optimized for whatever purpose they are being put 7 toward? 8 A. In a very -- I guess optimized, what do 9 you mean by "optimized?" 10 Q. If you're on Photoshop, aren't there 11 optimization settings? 12 A. Yes, I would imagine. those settings are 13 used and that's why they exist. 14 Q. And when people are editing photographs, 15 they are usually compressed in some way for use in 16 various products? 17 A. Some products and uses require 18 compression, yes. 19 Q. One of the ideas you address in your 20 reports is that certain wrestlers have a certain 21 values, right? 22 A. Loosely speaking -- what do you mean by 23 "value"? 24 Q. Well, one of the ways in which you assume 25 what value is, is by using the example that</p>

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1 wrestlers participate in promotional campaigns for
2 the games.

3 Do you remember that?

4 A. Yes.

5 MR. FRIEDMAN: Once again, Doctor, you can
6 ask for a copy of the report, if you feel like
7 you need to reference something because you're
8 being asked specific questions about it.

9 MR. SIMMONS: I'm not --

10 MR. FRIEDMAN: It's not a memory test.

11 MR. SIMMONS: I'm not asking him about the
12 specific report yet.

13 BY MR. SIMMONS:

14 Q. Do you know how Take-Two got wrestlers to
15 participate in promotional campaigns for WWE 2K?

16 A. I'm not aware of the specific details.

17 Q. You understand that participation in
18 promotional campaigns costs advertisers money,
19 right?

20 A. I would imagine so.

21 Q. And Take-Two would have paid wrestlers to
22 participate in its promotional campaigns, right?

23 A. I have no idea. I don't recall seeing any
24 materials that expressly addressed Take-Two paying
25 wrestlers directly for participation in promotional

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1 campaigns.

2 Q. But you would understand that when someone
3 participates in a promotional campaign, they are
4 often getting paid, right?

5 A. I imagine they're getting paid, yes.

6 Q. The more valuable wrestlers would be more
7 expensive to include in promotional campaigns,
8 right?

9 A. I would believe so, but I guess there's
10 also -- I'm not familiar. There are different kinds
11 of contracts that might establish different kinds of
12 relationships and different kinds of obligations.

13 Q. Let's say it a different way.

14 Would valuable wrestlers have busier
15 schedules due to their popularity?

16 A. I could speculate. I would imagine, yes.
17 But maybe not.

18 Q. And would you agree that valuable
19 wrestlers may be less likely to be available to
20 participate in promotional campaigns than less
21 valuable ones?

22 A. I can't really speak to the availability
23 of wrestlers for campaigns.

24 Q. You don't know either way, right?

25 A. No. I could speculate, I could imagine, I

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1 could argue.

2 Q. But you don't know?

3 A. I don't know for sure, no.

4 Q. You don't have an opinion on that, right?

5 A. I have a layperson's opinion.

6 Q. But you don't have an opinion in this
7 case?

8 A. Of whether or not?

9 Q. About the use of wrestlers in promotional
10 campaigns.

11 MR. FRIEDMAN: Objection.

12 THE WITNESS: So I did talk about the use
13 of wrestlers in promotional campaigns in my
14 report, yes.

15 BY MR. SIMMONS:

16 Q. So you would agree that wrestlers might
17 not be available for any given promotional campaign
18 for reasons such as being too busy, right?

19 A. Or being dead, yes.

20 Q. Is that a yes to my question?

21 A. I could imagine some wrestlers might not
22 be available, yes, that seems plausible.

23 Q. And you know that -- let me ask you this:
24 One example of -- one example from your report is
25 Randy Orton sending a congratulatory message about

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1 WWE 2K, right? Do you remember that?

2 A. Uh-huh.

3 Q. Now, he was -- that was from 2012, right?

4 A. I don't remember the exact year, but it is
5 in my report, so...

6 Q. But you remember mostly a lot of the
7 examples in your report are from 2012 -- 2008 to
8 2012, right?

9 A. I don't have a general sense of what years
10 all my examples were from.

11 Q. Are you aware that in your report, you
12 discuss examples that involved versions of WWE 2K
13 that are not at issue in this case?

14 A. Yes, I believe so.

15 Q. Okay. Those were produced by THQ, right?

16 A. I don't recall who produced them.

17 Q. Now, do you know whether Randy Orton was
18 paid to post that -- that --

19 A. I do not know.

20 Q. He may not be, right?

21 A. It is possible, yes.

22 Q. And you're on Twitter, right?

23 A. Actually, yes.

24 Q. Have you congratulated anyone on Twitter
25 before?

33 (Pages 126 to 129)

<p style="text-align: right;">Page 130</p> <p>1 A. Yes, I have.</p> <p>2 Q. And were you paid for that tweet?</p> <p>3 A. I have -- I have not been paid to tweet,</p> <p>4 expressly.</p> <p>5 Q. You've never been paid to tweet, right?</p> <p>6 A. Specifically paid to tweet, no, I have</p> <p>7 not.</p> <p>8 Q. So not every tweet of congratulations is a</p> <p>9 paid promotion, right?</p> <p>10 A. Not necessarily.</p> <p>11 Q. How many Twitter followers do you have?</p> <p>12 A. Oh, God. I do not know right now. I</p> <p>13 would have to check.</p> <p>14 Q. Would over 1,000 sound right?</p> <p>15 A. I think so, yes.</p> <p>16 Q. Would it surprise you that Dr. Bogost has</p> <p>17 102,000 followers?</p> <p>18 A. No, it would not be surprising.</p> <p>19 Q. That's because he's a well-known academic,</p> <p>20 right?</p> <p>21 A. I think he's well-known in areas beyond</p> <p>22 his academic work.</p> <p>23 Q. In what ways is he well-known?</p> <p>24 A. He's made games that have gotten a lot of</p> <p>25 critical and media attention.</p>	<p style="text-align: right;">Page 132</p> <p>1 that it was doing?</p> <p>2 A. Well, I think you're asking why was the</p> <p>3 game in the press?</p> <p>4 Q. Uh-huh.</p> <p>5 A. You would have to ask the press why they</p> <p>6 chose to cover his game, why they thought it was</p> <p>7 interesting.</p> <p>8 Q. What did the press say about the game?</p> <p>9 How about that?</p> <p>10 A. I think some press was reporting on</p> <p>11 Dr. Bogost talking about the game and talking about</p> <p>12 his surprise with the success that he was seeing</p> <p>13 with players.</p> <p>14 I believe -- I imagine he's given several</p> <p>15 talks about the game, and this might have been one</p> <p>16 of the earlier talks that might have been given at</p> <p>17 the game developers' conference. That could be</p> <p>18 wrong. It's been a while.</p> <p>19 My understanding is that he was surprised</p> <p>20 by the fact that people were taking his game</p> <p>21 seriously and were playing his game seriously, even</p> <p>22 though he had made the game as a sort of statement</p> <p>23 and perhaps even as sort of a joke.</p> <p>24 Q. So he created his game for one reason, and</p> <p>25 customers used it for a different reason?</p>
<p style="text-align: right;">Page 131</p> <p>1 Q. Such as?</p> <p>2 A. I think I believe Cow Clicker is the game</p> <p>3 he made that is perhaps the one that has gotten him</p> <p>4 the most attention.</p> <p>5 Q. Why is that?</p> <p>6 A. Why it got him so much attention?</p> <p>7 Q. Uh-huh.</p> <p>8 A. I don't know for sure. I'm not sure he</p> <p>9 even knows himself. My understanding from what I've</p> <p>10 read about it is that the attention it got was a</p> <p>11 surprise to him. You would have to ask him.</p> <p>12 Q. What kind of attention did it receive?</p> <p>13 A. A lot of press.</p> <p>14 Q. Uh-huh.</p> <p>15 A. And critical.</p> <p>16 Q. What was the press about?</p> <p>17 A. About this, about the game, and about</p> <p>18 how -- about what it was doing basically, is what I</p> <p>19 recall. I don't think I read all of the press about</p> <p>20 his game.</p> <p>21 Q. And what was the game doing?</p> <p>22 A. What do you mean "what was the game</p> <p>23 doing"?</p> <p>24 Q. You say he was getting press about the</p> <p>25 game, so I'm asking you, what was it about the game</p>	<p style="text-align: right;">Page 133</p> <p>1 A. I just think that he wasn't -- he was</p> <p>2 surprised by the reception the players had towards</p> <p>3 the game. That's not what he was expecting.</p> <p>4 Q. Because it wasn't what he designed it for,</p> <p>5 right?</p> <p>6 A. You would have to ask him what he designed</p> <p>7 it for. My speculation is he designed it as a form</p> <p>8 of critique and also kind of as a joke.</p> <p>9 Q. Would you agree that a single tweet would</p> <p>10 not play an active role in a video game's</p> <p>11 promotional campaign?</p> <p>12 A. I think -- I think that would depend on</p> <p>13 the tweet and who was tweeting and who saw it and</p> <p>14 what happened to that tweet afterwards.</p> <p>15 Q. Do you think Randy Orton was a huge part</p> <p>16 of WWE 2K's marketing?</p> <p>17 A. Was -- I don't know.</p> <p>18 Q. You don't cite any instances in your</p> <p>19 report in which Randy Orton appeared in person to</p> <p>20 promote WWE 2K games at issue in this case, right?</p> <p>21 A. I would have to look at my report, but I</p> <p>22 don't think so.</p> <p>23 Q. You don't cite any instances in which</p> <p>24 Randy Orton appeared in commercials to promote the</p> <p>25 games at issue in this case, right?</p>

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1 A. I'm not sure. I do -- I recall citing a
2 video in which he appeared, in my report.

3 Q. It was a video of Gameplay, right?

4 A. I would have to look at my report to be
5 sure. Or even look at the video.

6 Q. Randy Orton has never appeared on the
7 cover of the WWE 2K games at issue in this case,
8 right?

9 A. I believe that is correct.

10 Q. You are not aware of Mr. Orton being
11 featured in any television commercials for games at
12 issue in this case, right?

13 A. Like I said, I would have to go back to
14 see the video that I cited. Whether that video was
15 used as a commercial, I would have to see the video
16 again to be sure.

17 Q. And other than this one video of Mr. Orton
18 that you cited in your report, you are not aware of
19 any others, right?

20 A. I believe there were other videos in the
21 materials provided, I think, somewhere -- I'm not
22 sure. I would have to look at the list of the
23 materials that were played again. I think some of
24 them might have been commercials, and I think that
25 Mr. Orton might have appeared in some of them.

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1 Q. The real-world Mr. Orton or game-play of
2 Mr. Orton?

3 A. I'm not sure. I would have to look at
4 them again.

5 Q. Do you remember talking in your report
6 about lists of wrestlers?

7 A. You mean, like, wrestlers?

8 Q. Uh-huh.

9 A. Broadly speaking, yes.

10 Q. And those lists of -- those rosters of
11 wrestlers that appear in WWE 2K are used to inform
12 consumers who the wrestlers are in the game, right?

13 A. Broadly speaking -- well, that's one of
14 the uses, probably, yes.

15 Q. They serve that informational purpose,
16 right?

17 A. Also promotional purpose.

18 Q. They serve that informational purpose,
19 right?

20 A. Exclusively?

21 Q. That's not what I said. I said, do they
22 serve that informational purpose?

23 A. Do the rosters -- does publication of the
24 roster have informational value, yes.

25 Q. And they list the names of the players,

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1 right?

2 A. Of --

3 Q. The rosters list the names of the
4 wrestlers?

5 A. The wrestlers? Yes, I believe so.

6 Q. The rosters don't list the names of the
7 players' tattoos, do they?

8 A. What do you mean, the players?

9 Q. The rosters don't list the name of the
10 wrestlers' tattoo, do they?

11 A. The names of the tattoos, no, I believe
12 not.

13 Q. Your view is that these rosters are used
14 to drive demand for WWE 2K, right?

15 A. That's one of their uses.

16 Q. You've never tested the impact of a game
17 developer's releasing such a roster on the number of
18 sales of a video game, right?

19 A. I have not tested that, no.

20 Q. So you don't have data supporting your
21 conclusion that these player -- these wrestler
22 rosters are being used to drive up sales of the
23 game, right?

24 MR. FRIEDMAN: Object to form.

25 THE WITNESS: Data? Specific data? No.

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1 BY MR. SIMMONS:

2 Q. So it's not necessarily the case that
3 Mr. Orton be included on a roster of wrestlers for
4 the game as being used to drive sales, right?

5 MR. FRIEDMAN: Object to form.

6 THE WITNESS: You mean there might be
7 another reason?

8 BY MR. SIMMONS:

9 Q. Uh-huh.

10 A. Such as?

11 Q. I'm just trying to understand, you haven't
12 studied the effect of rosters on sales of the games,
13 and so they may not, in fact, drive sales, right?

14 A. So based on my experience and knowledge of
15 the games industry, and of game culture more
16 broadly, I believe the player role in sales, yes.

17 Q. But you could be wrong, right?

18 A. Yes. I guess people can be wrong, yes.

19 Q. The data may show that sales are not
20 driven by releasing rosters of wrestlers, right?

21 A. Yes, it might.

22 Q. And as you've already discussed, the
23 rosters wouldn't show a connection between the
24 tattoos and sales, right?

25 MR. FRIEDMAN: Object to form.

35 (Pages 134 to 137)

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<p>1 Mischaracterizes testimony.</p> <p>2 THE WITNESS: So if the roster had</p> <p>3 photographs of wrestlers, and those wrestlers</p> <p>4 had tattoos in areas that are covered by the</p> <p>5 photographs -- if I had a tattoo on my nose,</p> <p>6 for example -- I would expect those tattoos to</p> <p>7 show up in those photographs in that roster.</p> <p>8 BY MR. SIMMONS:</p> <p>9 Q. Mr. Orton's tattoos at issue in this case</p> <p>10 don't appear in the roster, right?</p> <p>11 A. Well, that would depend on the roster.</p> <p>12 Q. But the roster you're citing in your</p> <p>13 report, his tattoos don't appear in, right?</p> <p>14 A. I would have to look at those rosters</p> <p>15 again. So a roster could be just a text file:</p> <p>16 Here's a list of all the wrestlers. If it's just a</p> <p>17 text file with no pictures, his tattoos would not</p> <p>18 be -- would not appear there.</p> <p>19 Q. That's what the roster is in this case,</p> <p>20 right?</p> <p>21 A. The rosters take different forms and</p> <p>22 different shapes.</p> <p>23 Q. The roster you're citing in your report is</p> <p>24 just a list of names, right?</p> <p>25 A. I would have to go back and look at my</p>	<p>1 personality that WWE fans like?</p> <p>2 A. So I believe -- I believe Randy Orton, the</p> <p>3 wrestler, is popular in the WWE. And in this</p> <p>4 context, "popular" means that he must have fans who</p> <p>5 follow his exploits in the context of WWE.</p> <p>6 Q. Right. And do those fans like his</p> <p>7 personality?</p> <p>8 A. You would have to ask the fans why they</p> <p>9 are fans of him.</p> <p>10 Q. You haven't studied why fans like</p> <p>11 Mr. Orton, right?</p> <p>12 A. Specifically, no.</p> <p>13 Q. Do you think Mr. Orton is handsome?</p> <p>14 A. Personally?</p> <p>15 Q. As part of determining of whether he's</p> <p>16 popular, do you think the fact that he's handsome</p> <p>17 plays into that?</p> <p>18 MR. FRIEDMAN: Objection, foundation.</p> <p>19 THE WITNESS: I think some fans might</p> <p>20 follow Mr. Orton because they think he's</p> <p>21 handsome.</p> <p>22 BY MR. SIMMONS:</p> <p>23 Q. Mr. Orton has been successful in the WWE,</p> <p>24 right?</p> <p>25 A. That's my understanding, yes.</p>
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<p>1 report.</p> <p>2 Q. You don't remember?</p> <p>3 A. I don't remember exactly.</p> <p>4 Q. Do you believe Mr. Orton is currently one</p> <p>5 of the most important wrestlers in the WWE?</p> <p>6 A. What do you mean by "most important"?</p> <p>7 Q. Well, do you believe that some wrestlers</p> <p>8 are more important than others?</p> <p>9 A. Yes, I believe.</p> <p>10 Q. Why?</p> <p>11 A. It is my understanding that different</p> <p>12 wrestlers have different amounts of popularity with</p> <p>13 the fans, and that popularity may wax and wane over</p> <p>14 time.</p> <p>15 I believe that some wrestlers might be</p> <p>16 more productive commercially for the WWE. So some</p> <p>17 wrestlers might be more valuable in that sense.</p> <p>18 They might sell more merchandise, for example.</p> <p>19 Q. Let me ask you this: Is Mr. Orton more</p> <p>20 important because he's a recognizable person?</p> <p>21 A. I believe that Mr. Orton is recognizable,</p> <p>22 yes.</p> <p>23 Q. Do you believe that Mr. Orton has a</p> <p>24 personality that WWE 2K -- strike that.</p> <p>25 Do you believe that Mr. Orton has a</p>	<p>1 Q. His success is part of the reason why he's</p> <p>2 more popular than other wrestlers, right?</p> <p>3 A. Wait. Can you restate that?</p> <p>4 Q. Mr. Orton's success is part of the reason</p> <p>5 why he's more popular than other wrestlers, right?</p> <p>6 A. It's a chicken-and-egg question. That's</p> <p>7 why I'm confused.</p> <p>8 We could say he's successful because he's</p> <p>9 popular.</p> <p>10 Q. Mr. Orton has won a number of titles in</p> <p>11 the WWE?</p> <p>12 A. That is my understanding.</p> <p>13 Q. And the fact that he's won a number of</p> <p>14 titles makes him more popular than wrestlers who</p> <p>15 haven't, right?</p> <p>16 A. I think you'd have to ask the WWE why he</p> <p>17 won more titles and if that decision was based on</p> <p>18 his popularity at the time.</p> <p>19 Q. You haven't asked fans why they like</p> <p>20 Mr. Orton, right?</p> <p>21 A. No, I have not specifically talked to fans</p> <p>22 of Mr. Orton.</p> <p>23 Q. You haven't asked the WWE why he's</p> <p>24 popular, right?</p> <p>25 A. I have not asked the WWE why they think</p>

<p style="text-align: right;">Page 142</p> <p>1 he's popular. They might not know, but I have not 2 asked them. 3 Q. Do you think Mr. Orton is a charismatic 4 person? 5 A. I do not know Mr. Orton personally. 6 Q. Do you think fans connect with this 7 personality? 8 A. I think some fans might connect with his 9 personality. 10 Q. Do you think that's part of the reason why 11 he's an important wrestler to the WWE? 12 A. I think he's important to the WWE because 13 he has fans. 14 Q. We talked earlier today about 15 verisimilitude. 16 A. Uh-huh. 17 Q. Do you think Mr. Orton's facial features 18 contribute to -- in WWE 2K, contribute to its 19 verisimilitude? 20 A. If his facial features in the game are 21 part of the character's -- Randy Orton, the 22 character's verisimilitude to Randy Orton, the 23 wrestler, yes, that's part of it. 24 Q. If his facial features were different in 25 real life, the game would be less</p>	<p style="text-align: right;">Page 144</p> <p>1 face. Maybe there are some fans, that that's what 2 they like, the same way I might have a poster of a 3 rock star in my bedroom and think that this rock 4 star is beautiful. 5 Q. I see. 6 So you're saying that the specific 7 features he has are not why people buy the game; 8 it's the fact that the game has the same features 9 that he has in real life; is that correct? 10 A. I would imagine that people -- people have 11 different reasons for buying games. People who are 12 fans of the WWE, who also buy the video games, could 13 buy the game because Randy Orton is in the game, and 14 perhaps would not buy the game if he was not in the 15 game. 16 Q. That's not quite what I'm getting at. 17 What I'm trying to focus on is, you 18 believe that people buy the WWE 2K games because 19 they look similar to real life, right? 20 A. I believe that people buy WWE games 21 because they expect the WWE experience in their 22 games. 23 Q. And if the -- 24 A. And that includes the characters in the 25 game looking like the wrestlers in real life.</p>
<p style="text-align: right;">Page 143</p> <p>1 verisimilitudenous, right? 2 A. Yes. 3 Q. And it would be less realistic, true? 4 A. Yes. 5 Q. If his hair was different than in real 6 life, it would be less verisimilitudenous, right? 7 A. Yes, if he had a different hairstyle for 8 example. 9 Q. And it would be less realistic? 10 A. Yes. 11 Q. So would you agree that Mr. Orton's facial 12 features also drive users to purchase WWE 2K? 13 A. You mean his -- whose features? 14 Q. Do you believe that Mr. Orton's facial 15 features are one of the reasons that purchasers of 16 WWE 2K purchase the game? 17 MR. FRIEDMAN: Object to form. Ambiguous. 18 THE WITNESS: Are you asking me if I think 19 people buy the game because of his face? 20 BY MR. SIMMONS: 21 Q. Yes. 22 A. That seems unlikely. 23 Q. Why not? 24 A. Because I think some people might buy the 25 game because of his face and because they like his</p>	<p style="text-align: right;">Page 145</p> <p>1 Q. And if -- if the specific things that 2 exist in real life, if they were different, as long 3 as the game matched the real world, that -- your 4 overarching point is that's the relationship that's 5 important here, right, not the specific features of 6 his face? 7 MR. FRIEDMAN: Object to form. Compound. 8 THE WITNESS: So the specific features 9 matter, yes. Are they the source of the 10 purchasing decision being made? So, the 11 specific features matter, in that it's 12 important to not get them wrong. 13 BY MR. SIMMONS: 14 Q. Right. 15 So, if the features changed in real life, 16 as long as the game also changes to match real life, 17 your view is that purchasing power -- purchasing 18 likelihood would be the same, right? 19 MR. FRIEDMAN: Objection to form. 20 Mischaracterizes. 21 BY MR. SIMMONS: 22 Q. Let me give you an example. If 23 Mr. Orton -- if Mr. Orton broke his nose, and it 24 became misshaped -- 25 A. Uh-huh.</p>

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1 Q. -- in your view, the video game, to
2 maintain the level of verisimilitude expected by
3 purchasers, would also want to change his nose to be
4 whatever the new shape of his nose would be, right?

5 A. Yes.

6 Q. And it is not the fact that his -- the
7 shape looks one way or the other that matters; it's
8 the fact that the shape is the same in the game as
9 in real life?

10 A. Yes.

11 Q. So is it your view, with regard to the
12 tattoos, that the importance is that they look in
13 the game how they look in real life?

14 A. Yes, that's part of it.

15 Q. And if Mr. Orton changed his tattoos in
16 real life, the purchasing power or intent that you
17 have discussed in your report would need to exceed
18 the in-game tattoos' change as well, right?

19 A. I think that the players would expect a
20 game character Randy Orton. So let's say he added a
21 green tattoo all over his face. He's not going to
22 do that, but... Then --

23 Q. Don't put it past him.

24 A. I would -- I would expect players -- or I
25 would expect consumers and players to expect Randy

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1 Orton to appear in the game with his new tattoos in
2 the game. I would expect that. And I would expect
3 the creators would try to make that happen as well.

4 Q. So when you say that purchasers of WWE 2K
5 are making purchases of the game based on its
6 inclusion of the tattoos --

7 A. No, that's not what I'm saying.

8 Q. I'm sorry.

9 A. I'm not saying that people are buying the
10 game because of the tattoos.

11 Q. Got you.

12 So just to be clear, so it's your opinion
13 that purchasers are not buying the game because of
14 the tattoos?

15 A. There might be -- there might be people
16 who buy the game because of the tattoos, but I would
17 generally say that that's not, like, a purchasing
18 reason.

19 Q. It's your -- it's your opinion --

20 A. My opinion is that --

21 Q. It's your opinion -- sorry.

22 It's your opinion that it's not a
23 purchasing reason that the tattoo -- strike that.

24 It's your view that the tattoos are not a
25 purchasing reason for the game?

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1 MR. FRIEDMAN: Objection, form.
2 Mischaracterizes.

3 THE WITNESS: I would say that generally
4 speaking, people that buy the game would not
5 list, I bought this game for the tattoos, as
6 their primary reason for purchase.

7 BY MR. SIMMONS:

8 Q. And so if the tattoos at issue in this
9 case were completely changed on Mr. Orton's body,
10 completely different images --

11 A. Uh-huh.

12 Q. -- you would agree with me that purchasers
13 wouldn't expect to see the current tattoos in the
14 game, right?

15 A. I'm -- I'm --

16 Q. If the tattoos as they currently exist
17 were completely changed to something else?

18 A. Where?

19 Q. I'm sorry. Strike that.

20 If Mr. Orton's real-life tattoos were
21 completely changed to different images --

22 A. Okay.

23 Q. -- it's your view that purchasers of WWE
24 2K would expect the game to match those changed
25 versions of the tattoos?

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1 A. Yes, I would expect that.

2 Q. The purchasing decision isn't about
3 something inherent to the tattoos themselves, right?

4 A. Yes. I think I already answered that. I
5 don't think people buy the game because of the
6 tattoos.

7 Q. Right. They might buy the game, in your
8 view, because the tattoos exist on Mr. Orton and
9 they want to see a realistic depiction of Randy
10 Orton in the game?

11 A. I would say people buying the game would
12 expect Mr. Orton in the game to look like Mr. Orton
13 does in real life.

14 Q. Is that a yes?

15 A. Your question was a bit confusing, so...

16 Q. So let me try to clarify it.

17 If the tattoos Mr. Orton had everywhere on
18 his body were just circles --

19 A. Uh-huh.

20 Q. -- geometric shape circles --

21 A. Yes.

22 Q. -- and the game also had geometric circles
23 on the real -- on the Randy Orton, the same analysis
24 of the purchasing decision would apply, right?

25 A. What do you mean by "same analysis"?

38 (Pages 146 to 149)

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1 Q. I'm trying -- maybe you can help me.

2 There is nothing about the design of the
3 tattoos as works of art that leads to purchasing of
4 the -- in the game; it's the fact that they are on
5 Randy Orton in real life, and the game is
6 replicating the real world, right?

7 MR. FRIEDMAN: Objection, form. Vague.

8 You can answer, if you can.

9 THE WITNESS: So I don't think that
10 Mr. Orton's -- for the context of the game, I
11 think Mr. Orton's tattoos are notable
12 because -- are notable on the character because
13 Mr. Orton has them in real life.

14 BY MR. SIMMONS:

15 Q. But there's nothing about the artistry of
16 the tattoos that are leading to purchasing
17 decisions, right?

18 A. I don't think so.

19 Q. Would you agree that for verisimilitude,
20 if Mr. Orton looked the way he did in real life but
21 all of the other wrestlers did not, that would
22 affect purchasing decisions?

23 A. Yes.

24 Q. Because making sure other wrestlers look
25 how they look in real life is also driving consumer

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1 demand, right?

2 A. Yes.

3 Q. And the settings also need to look how
4 they look in real life to drive consumer demand,
5 right?

6 A. To different degrees, but, yes.

7 And also to the wrestlers, to different
8 degrees.

9 Q. But if you had a group -- having Randy
10 Orton look realistic and no one else looked
11 realistic would be problematic from a consumer
12 demand point of view, in your view, right?

13 A. Yes, for the kinds of games that we've
14 talked about.

15 Q. For these games?

16 A. Yes, for these games specifically, yes.

17 Q. And the fact that the arenas look the way
18 that they look when you're watching WWE wrestling on
19 television also drives demand for the game?

20 A. It is a factor, yes.

21 Q. So the tattoos are just one of the myriad
22 of things that would need to be realistic or
23 verisimilitudinous to drive consumer demand for WWE
24 2K, right?

25 A. In the context of, and we talked about

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1 this before, Randy Orton's tattoos are only part of
2 what he looks like, not the entirety of what he
3 looks like. So, in that context, yes.

4 Q. And every part of what he looks like is
5 part of the verisimilitudinous discussed in your
6 report, right?

7 A. Yes.

8 Q. So you need to have all of that together
9 to be verisimilitudinous?

10 A. Yes, but I think there are also different
11 degrees. So if the game gets the pattern on the
12 soles of his shoes wrong, that's different than if
13 they get, you know --

14 Q. What his body looks like, right? What his
15 body looks how it looks in the game -- in real life,
16 right?

17 A. Generally speaking, yes.

18 MR. FRIEDMAN: Mr. Zagal, if you were
19 trying to finish an answer, you can finish it.

20 THE WITNESS: No.

21 MR. FRIEDMAN: I don't know if you were
22 finished. It seemed like you were being cut
23 off.

24 BY MR. SIMMONS:

25 Q. So Mr. Orton -- Mr. Orton's real-world

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1 popularity is a contributor to the success of the
2 WWE 2K games, right?

3 A. I believe so, yes.

4 Q. What is your basis for that opinion?

5 A. My experience with games in general. My
6 layperson's understanding and knowledge of
7 celebrities and the role they play in the
8 commercialization of products and services and
9 whatnot.

10 Q. Anything else?

11 A. My experience and knowledge of the games
12 industry.

13 Q. Did you conduct any studies to determine
14 whether his popularity was contributory to the
15 success of the WWE 2K games at issue?

16 A. Not specifically, no.

17 Q. Did you conduct any research concerning
18 whether his popularity is a contributor to the
19 success of the WWE 2K games at issue, other than
20 what is put forth in your report?

21 A. So separate from this case, no.

22 Q. Are you aware of any studies as to --
23 strike that.

24 If you were going to conduct a study to
25 determine whether Mr. Orton's popularity was

39 (Pages 150 to 153)

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<p>1 contributing to the success of the WWE 2K games</p> <p>2 sales, you would survey purchasers, right?</p> <p>3 A. I could. But there are other things I</p> <p>4 could also do.</p> <p>5 Q. But that would be helpful, right?</p> <p>6 A. It could be helpful.</p> <p>7 Q. And you didn't do that here?</p> <p>8 A. I did not study purchasers.</p> <p>9 Q. You say that one of the bases for your</p> <p>10 opinion is your game experience in general.</p> <p>11 Do you mean your experience in purchasing</p> <p>12 games? Or something else?</p> <p>13 A. It includes that, but also my knowledge of</p> <p>14 the industry, of the communities, of the culture, of</p> <p>15 the business trends, and their evolution, the</p> <p>16 history of different companies, histories of</p> <p>17 different games, and so on. It's pretty broad.</p> <p>18 Q. You have not studied the likely purchasers</p> <p>19 of WWE 2K video games, right?</p> <p>20 A. I believe you asked me that already.</p> <p>21 Q. This is a slightly different question.</p> <p>22 My question is whether you have studied</p> <p>23 the likely -- who the likely purchasers of WWE 2K</p> <p>24 games are?</p> <p>25 A. Specifically, no, I have not studied that.</p>	<p>1 speculation.</p> <p>2 THE WITNESS: Yeah, what do you mean?</p> <p>3 BY MR. SIMMONS:</p> <p>4 Q. Your opinions aren't based on replicable</p> <p>5 analysis, right? It is your own personal opinion?</p> <p>6 MR. FRIEDMAN: Objection, form.</p> <p>7 THE WITNESS: On my experience and</p> <p>8 knowledge as an expert in video games, yes.</p> <p>9 BY MR. SIMMONS:</p> <p>10 Q. But --</p> <p>11 A. But not on a specific study.</p> <p>12 Q. Another expert could not replicate the</p> <p>13 bases for your opinion that the sales of WWE 2K</p> <p>14 games at issue would suffer without Mr. Orton's</p> <p>15 tattoos, right?</p> <p>16 MR. FRIEDMAN: Object to form.</p> <p>17 THE WITNESS: You're use of "replicate" is</p> <p>18 confusing me.</p> <p>19 BY MR. SIMMONS:</p> <p>20 Q. So let me see if I can help you.</p> <p>21 There are studies where someone does a</p> <p>22 survey, right?</p> <p>23 A. Uh-huh. Yes.</p> <p>24 Q. Someone might go out and do a word count</p> <p>25 in a book to determine how many words are there,</p>
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<p>1 Q. You say one of the bases of your opinion</p> <p>2 is your experience and knowledge of the games</p> <p>3 industry.</p> <p>4 Is that the same as what you just</p> <p>5 described to me a moment ago, or is that something</p> <p>6 additional?</p> <p>7 A. I believe I was trying to give more detail</p> <p>8 on what the games industry means -- games industry</p> <p>9 culture practices. It's all a big area.</p> <p>10 Q. You believe that sales of the WWE 2K games</p> <p>11 at issue in this case would suffer without</p> <p>12 Mr. Orton's tattoos, right?</p> <p>13 A. Yes.</p> <p>14 Q. What is your basis for that opinion?</p> <p>15 A. All of my experience and knowledge as</p> <p>16 previously described.</p> <p>17 Q. But you haven't conducted any studies of</p> <p>18 that?</p> <p>19 A. Specifically, no.</p> <p>20 Q. And if the Court wanted to hire another</p> <p>21 expert to make a determination, they couldn't --</p> <p>22 there would be no study that could be replicated to</p> <p>23 determine whether your opinions were accurate,</p> <p>24 right?</p> <p>25 MR. FRIEDMAN: Objection, calls for</p>	<p>1 right?</p> <p>2 A. Uh-huh.</p> <p>3 Q. Those are things that could be replicated</p> <p>4 by another person, to determine whether the first</p> <p>5 person's analysis was correct, right?</p> <p>6 A. So count the words in a book, yes.</p> <p>7 Q. Surveying consumers is also replicable?</p> <p>8 A. It's social science research, which is</p> <p>9 complicated.</p> <p>10 Q. Do you have any understanding of the</p> <p>11 scientific method?</p> <p>12 A. Yes.</p> <p>13 Q. And part of that method is being the</p> <p>14 replicability of the results, right?</p> <p>15 A. There are different kinds of research.</p> <p>16 Not all research lends itself to replication in</p> <p>17 the standard -- not in the standard -- in the</p> <p>18 authoritarian sense.</p> <p>19 Q. So in the sense of being able to replicate</p> <p>20 research, your opinions in this case are not based</p> <p>21 on something that could be replicated, to determine</p> <p>22 whether the sales of the WWE 2K games at issue would</p> <p>23 suffer without Mr. Orton's tattoos, right?</p> <p>24 MR. FRIEDMAN: Object to form.</p> <p>25 THE WITNESS: So my opinion is not based</p>

40 (Pages 154 to 157)

<p style="text-align: right;">Page 158</p> <p>1 on a specific study that was done. If someone 2 else were to have my same knowledge and 3 experience and they read the same things as me, 4 would they have the same opinion? That's what 5 I -- 6 BY MR. SIMMONS: 7 Q. Just for the record, that is no, right? 8 Would they have the same opinion? No, not 9 necessarily? 10 A. I don't know. 11 Q. Because there isn't something that was 12 done that could be redone again, right? 13 MR. FRIEDMAN: Objection, form. Asked and 14 answered. 15 THE WITNESS: I would say no, because we 16 don't have the methods to be able to answer 17 that question at the moment. 18 BY MR. SIMMONS: 19 Q. Okay. You believe that the Defendants in 20 this case expected that use of tattoos on Mr. Orton 21 in the WWE 2K games at issue in this case would 22 drive sales and increase profits to some extent, 23 right? 24 A. I believe that they expected that the 25 inclusion of Randy Orton in the games the way he</p>	<p style="text-align: right;">Page 160</p> <p>1 case, right? 2 A. I don't believe I commented in my report 3 on whether or not tattoos specifically, only by 4 themselves, devoid of any context, drives sales. 5 Q. You believe that video game fans and 6 prospective buyers of WWE 2K games care about 7 Mr. Orton's appearance in the games at issue, right? 8 A. Broadly speaking, yes. 9 Q. What is your basis for that opinion? 10 A. Again, my broad knowledge of the industry, 11 and specifically, in the report, I think I provide 12 some examples of fans caring about Mr. Orton's 13 appearance in the game specifically. 14 Q. So other than the examples cited in your 15 report, you didn't conduct a larger study, right? 16 A. No, I did not conduct a large-scale study. 17 Q. And do you remember that the number of 18 instances discussed in your report is about less 19 than 10? 20 A. I would have to look at the report to 21 answer that specifically. 22 Q. But it is not -- it is not a high volume, 23 right? 24 A. What do you mean by "high"? 25 Q. Well, you understand that to draw</p>
<p style="text-align: right;">Page 159</p> <p>1 looks in real life would drive sales, yes, to a 2 certain degree or extent. 3 Q. But you don't reach the issue of whether 4 the use of the tattoos was part of that, right? 5 A. I believe if the tattoos were wrong, that 6 would -- I believe in my report, I state that if his 7 tattoos were wrong, as in not the way they look on 8 Randy Orton, the person, then that would have a 9 negative effect on sales. 10 Q. But your -- just to be clear, your 11 opinions don't extend to whether the tattoos alone, 12 leaving aside this overarching verisimilitudinous 13 question, drives sales or increases profits in the 14 games at issue in this case, right? 15 A. You're asking if I comment on that in my 16 report? 17 Q. I'm asking if you reached an opinion on 18 it. 19 A. In the sense that the tattoos are part of 20 Randy Orton's character, I think they matter. 21 Q. But leaving aside the verisimilitudinous 22 issue of their being the same as what exists in the 23 real world, you didn't reach a conclusion about the 24 tattoos as works of art and whether they drive sales 25 or lead to profits of the games at issue in this</p>	<p style="text-align: right;">Page 161</p> <p>1 conclusions in a scientific, replicable study, you 2 would need a certain pool of people to draw -- to 3 draw conclusions about a broader population, right? 4 A. So what is your research question? 5 Q. Well, I'm just -- let's focus on it 6 step-by-step. 7 So you understand that when you are doing 8 your own studies, you need a certain amount of data 9 to start being able to draw conclusions that go 10 beyond just what is specifically in that data, 11 right? 12 A. It depends on the kind of research that 13 you're doing. 14 Q. Okay. Well, for example, when you -- you 15 have done studies of -- of reviews of video games, 16 right? 17 A. Yes. 18 Q. And you need a certain sample size for 19 those reviews to be able to draw broad-based 20 conclusions for your research, right? 21 A. So the amount of reviews -- what you may 22 look at and how much of it you need to look at will 23 depend on the research questions you're asking and 24 the methods that you're using. 25 Q. Right.</p>

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1 So you wouldn't look at one review of a
2 game and say, Every person thinks the same thing as
3 this review of the game, right?

4 A. I would not say that specifically.

5 Q. And that's because the sample size is too
6 small, correct?

7 A. It has to do with the claims being made in
8 this case.

9 Q. Right.

10 And so when the claim is, this is a belief
11 about a video game by reviewers at large, you
12 wouldn't rely on just one reviewer, right?

13 A. If I were to make a claim about reviewers,
14 I would be specific about what I mean by
15 reviewers at large, and I only looked at one review,
16 that would probably be a -- it would be a really
17 hard claim to make.

18 Q. And when you have done studies, you had
19 thousands of reviews that you looked at, to draw
20 your conclusions about reviewers at large, right?

21 A. I have done different kinds of studies
22 looking at different scales of reviews. Some
23 studies I've done have included many thousands, and
24 others less than a thousand.

25 Q. But certainly hundreds, right?

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1 A. I would have to go back and look.

2 What I'm saying is, I have done studies
3 that have looked at reviews and looked at different
4 scales in the amount of reviews being studied.

5 Q. Right. And so to draw a conclusion about
6 what all reviewers think or to draw a conclusion
7 about what reviewers in general think, you would
8 need a large number of sample -- an appropriate
9 sample size of reviews, right?

10 A. For some studies, an appropriate sample
11 size -- or a predetermined appropriate sample size
12 is necessary.

13 Q. And a sample size of less than 10 reviews
14 to determine what reviewers think in general would
15 be small in most studies, right?

16 A. That would depend on what the study is
17 about and what it was saying and how it was done.

18 Q. Are you aware of a peer-reviewed quality
19 study of less than 10 reviews that was used to reach
20 conclusions about reviewers in general?

21 A. Well, that's super-specific. I'm not
22 aware of a specific study that does that.

23 Q. That's because the sample size would be
24 small for the conclusion being reached, right?

25 A. Again, that would depend on the kind of

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1 study being done. There are some methods -- some
2 research methods in which you add reviews, and you
3 keep on adding reviews until -- or you add data and
4 you keep on adding data until you reach a certain
5 moment.

6 So the total number of points of data
7 being added is not determined -- is not
8 predetermined. Rather, you reach a point of what
9 they might call, let's say, saturation, for example.

10 Q. It is unlikely to have saturation for
11 reviewers in general with less than 10 reviews,
12 right?

13 A. It would depend on what those 10 reviews
14 are and how they are selected.

15 Q. You're not aware of any peer-reviewed
16 study that has that methodology, right?

17 A. You're asking about a specific study
18 configuration with only partial details, and so I'm
19 not aware of a study that has that specificity, off
20 the top of my head.

21 Q. Is it your view that there's crossover
22 between purchasers of WWE 2K and WWE fans?

23 A. What do you mean by "crossover"?

24 Q. Are they the same people?

25 A. Yes, I believe that some of the people

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1 that buy the game are also fans of WWE.

2 Q. Why do you believe that?

3 A. Because of what we know about fans and fan
4 behavior.

5 Q. And what we know is that when you are a
6 fan of a -- of a franchise like the WWE, you are
7 more likely to purchase things connected with that
8 franchise, right?

9 A. Broadly speaking, yes.

10 Q. So fans will connect with merchandise,
11 video games and other products related to the
12 franchise that they already have fan loyalty to,
13 correct?

14 A. Fandom is complicated. There are
15 different entry points to fandom. Some people might
16 be fans of WWE and also like video games, and then
17 also -- and then purchase the games.

18 Other people might be fans of the WWE
19 wrestling, and then through the game discover the
20 characters and so on, and then become fans of the --
21 I'll call it the show.

22 Q. So you would agree that there is a portion
23 of fans that purchase WWE 2K because of their
24 affinity for the WWE or the WWE's wrestling, right?

25 A. Yes, broadly speaking.

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<p style="text-align: right;">Page 166</p> <p>1 Q. Have you determined in this case how many</p> <p>2 purchasers of WWE 2K fall into that category?</p> <p>3 A. The category of being fans of --</p> <p>4 Q. I will ask the question again.</p> <p>5 Have you determined in this case how many</p> <p>6 purchasers of WWE 2K primarily purchased the games</p> <p>7 because of their pre-existing affinity for the WWE</p> <p>8 and the WWE's wrestling?</p> <p>9 A. No, I have not done that.</p> <p>10 Q. You haven't conducted a survey about the</p> <p>11 primary purchasing behavior of WWE 2K consumers at</p> <p>12 all, right?</p> <p>13 A. I have not.</p> <p>14 Q. Did you consult any data with regard to</p> <p>15 the purchasing intent for the WWE 2K games?</p> <p>16 A. Hmm. You mean, like, survey data?</p> <p>17 Q. Sure.</p> <p>18 A. No, I did not consult survey data</p> <p>19 regarding purchasing intent.</p> <p>20 Q. Any other kind of data other than consumer</p> <p>21 reviews or critical reviews?</p> <p>22 A. There's online commentary, articles,</p> <p>23 people writing about the games, people making videos</p> <p>24 about the games, people commenting on the games,</p> <p>25 those kind of things I did look at.</p>	<p style="text-align: right;">Page 168</p> <p>1 A. I believe so, yes.</p> <p>2 Q. And the WWE -- the @WWE Twitter handle</p> <p>3 that you considered is the Twitter handle of the</p> <p>4 WWE, as an organization, right?</p> <p>5 A. I think I might have also referred to the</p> <p>6 game one, so...</p> <p>7 Q. But those are not -- neither the game</p> <p>8 Twitter handle nor WWE's Twitter handle are</p> <p>9 representing individual fans of all of the wrestlers</p> <p>10 of WWE, right?</p> <p>11 A. Hmm.</p> <p>12 Q. Let me ask it a different way. Not every</p> <p>13 fan of the WWE is going to have Twitter, right?</p> <p>14 A. I believe so, yes.</p> <p>15 Q. Not every fan of WWE 2K is going to have</p> <p>16 Twitter, right?</p> <p>17 A. Yes, that's fair.</p> <p>18 Q. We discussed earlier today some of the</p> <p>19 wrestlers that you have played in WWE 2K, and one of</p> <p>20 them was The Undertaker; do you remember that?</p> <p>21 A. Uh-huh.</p> <p>22 Q. Do you think that The Undertaker is more</p> <p>23 or less popular than Randy Orton?</p> <p>24 A. Nowadays?</p> <p>25 Q. Sure.</p>
<p style="text-align: right;">Page 167</p> <p>1 Q. And all of the commentary that is the</p> <p>2 basis of your opinions are in your report, right?</p> <p>3 A. I did not cite everything I looked at in</p> <p>4 my report.</p> <p>5 Q. So there are -- there is commentary that</p> <p>6 you considered in reaching your opinions that is not</p> <p>7 contained in your report?</p> <p>8 MR. FRIEDMAN: Object to form.</p> <p>9 THE WITNESS: In the broad sense that I</p> <p>10 looked at more things and formed my opinions</p> <p>11 based on everything I looked, yes.</p> <p>12 BY MR. SIMMONS:</p> <p>13 Q. I just want to be clear. So there are</p> <p>14 more things than are cited in your report that you</p> <p>15 considered in reaching your opinions in this case,</p> <p>16 right?</p> <p>17 MR. FRIEDMAN: Same objection.</p> <p>18 THE WITNESS: Yes.</p> <p>19 BY MR. SIMMONS:</p> <p>20 Q. Do you remember talking about in your</p> <p>21 report the number of social media followers Randy</p> <p>22 Orton has?</p> <p>23 A. Yes.</p> <p>24 Q. And you compare his Twitter followers to</p> <p>25 the WWE's Twitter account itself, right?</p>	<p style="text-align: right;">Page 169</p> <p>1 A. I don't know.</p> <p>2 Q. Do you think The Undertaker drives</p> <p>3 purchasing for WWE 2K?</p> <p>4 A. To an extent, probably.</p> <p>5 Q. Do you think he drives more purchasing</p> <p>6 power for WWE 2K than Randy Orton?</p> <p>7 A. I don't know.</p> <p>8 Q. You haven't considered it?</p> <p>9 A. No.</p> <p>10 Q. You haven't compared different wrestlers</p> <p>11 in terms of who drives more purchasing power,</p> <p>12 purchasing of WWE 2K, than other wrestlers, right?</p> <p>13 A. I have not compared different wrestlers in</p> <p>14 terms of their purchasing driving potential, no.</p> <p>15 Q. So based upon your opinions in this case,</p> <p>16 we can't figure out how many purchases -- proportion</p> <p>17 of purchases would be made because of Randy Orton</p> <p>18 being in the game versus the over 200 other</p> <p>19 wrestlers that are in the game, right?</p> <p>20 A. So, in my report, I don't claim how much.</p> <p>21 Q. Right. You don't -- you don't apportion</p> <p>22 the value of Randy Orton versus other wrestlers to</p> <p>23 the purchasing of WWE 2K, right?</p> <p>24 A. I do not do that in my report.</p> <p>25 Q. And you don't apportion the value of the</p>

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<p>1 tattoos at issue in this case versus the other</p> <p>2 aspects of WWE 2K in driving purchasing, right?</p> <p>3 A. In my report, I do not do that, as far as</p> <p>4 I recall.</p> <p>5 Q. And you do not conclude in your report --</p> <p>6 strike that.</p> <p>7 Your report does not state that any given</p> <p>8 purchase of WWE 2K was made because of the tattoos</p> <p>9 at issue in this case, right?</p> <p>10 A. I believe I do not make the claim that a</p> <p>11 specific purchase of the game was made by someone</p> <p>12 because of the tattoos. I don't believe I make that</p> <p>13 claim.</p> <p>14 Q. You would agree with me that appearing on</p> <p>15 video game front cover -- strike that.</p> <p>16 You would agree that when a wrestler</p> <p>17 appears on a cover of the WWE 2K games at issue, it</p> <p>18 is likely because they are driving or involved in</p> <p>19 purchasing behavior among consumers, right?</p> <p>20 A. I believe that the decision to place a</p> <p>21 particular wrestler on the cover of a game is a</p> <p>22 commercial decision.</p> <p>23 Q. And by that you mean it is a decision</p> <p>24 intended to result in more sales of video games?</p> <p>25 A. More profit.</p>	<p>1 Q. But that is not based on statistics of</p> <p>2 actual fans, right?</p> <p>3 A. No. No, it just looks at Twitter</p> <p>4 followers.</p> <p>5 Q. It's not based on any analysis at all,</p> <p>6 right?</p> <p>7 A. If the comparison is the physical</p> <p>8 analysis, then, yes, it is, but I'm just comparing</p> <p>9 two numbers.</p> <p>10 Q. But you're comparing people who joined</p> <p>11 Twitter and follow those organizations, not people</p> <p>12 who indicated an interest in either of those</p> <p>13 organizations, right?</p> <p>14 A. I'm comparing followers -- Twitter</p> <p>15 followers exclusively.</p> <p>16 Q. You would agree with me that some Twitter</p> <p>17 followers follow people they are not fans of, right?</p> <p>18 A. Yes, that might be the case.</p> <p>19 Q. You might follow someone who you don't</p> <p>20 agree with the politics of, right?</p> <p>21 A. Yes, that is possible.</p> <p>22 Q. Do you follow anyone on Twitter whose</p> <p>23 politics you disagree with?</p> <p>24 A. A lot of the people I follow, I have no</p> <p>25 idea what their politics are.</p>
Page 171	Page 173
<p>1 Q. And Mr. Orton has not appeared on the</p> <p>2 front cover of any of the video games at issue in</p> <p>3 this case, right?</p> <p>4 A. I believe not.</p> <p>5 Q. And would it surprise you to know that</p> <p>6 Seth Rollins, who does appear on the cover of one of</p> <p>7 the video games in this case, has fewer Twitter</p> <p>8 followers than Mr. Orton?</p> <p>9 A. I guess I don't have a basis to form an</p> <p>10 opinion of how many Twitter followers I would expect</p> <p>11 him to have.</p> <p>12 Q. Aren't you drawing the conclusions that</p> <p>13 more Twitter followers equals more purchasing</p> <p>14 intent?</p> <p>15 A. More Twitter followers is better as a --</p> <p>16 it can indicate popularity. It could indicate.</p> <p>17 Q. But it doesn't make it by itself, right?</p> <p>18 A. If that's all you had, no, I think it</p> <p>19 would be really hard to make that claim.</p> <p>20 Q. So when you conclude in your report that</p> <p>21 Mr. Orton is half as popular as the WWE as a whole,</p> <p>22 you do that based on the Twitter followers he and</p> <p>23 the WWE have, right?</p> <p>24 A. As a loose comparison, yes, I make that</p> <p>25 loose comparison in my report.</p>	<p>1 Q. Are there people who you follow whose</p> <p>2 politics you disagree with?</p> <p>3 A. I believe that it is likely.</p> <p>4 Q. Are there people you follow who you are</p> <p>5 not a fan of?</p> <p>6 A. So the people I follow on Twitter are</p> <p>7 people I've chosen to follow. So it depends on what</p> <p>8 you mean by "am I a fan of."</p> <p>9 Q. Are there people who you follow for</p> <p>10 reasons other than being a fan?</p> <p>11 A. What do you mean by "fan," then?</p> <p>12 Q. What did you mean when you said that in</p> <p>13 your report?</p> <p>14 A. I was referring to the broad sense of fan</p> <p>15 as someone who follows something and has an interest</p> <p>16 in it.</p> <p>17 In the context of specific people I might</p> <p>18 follow on Twitter, there might be a prior</p> <p>19 relationship between the two people, which you would</p> <p>20 not describe as a fan.</p> <p>21 Q. And so when you say that your description</p> <p>22 of a fan in your report is the broad sense of</p> <p>23 someone who follows something they are interested</p> <p>24 in, is it fair for me to say that the number of</p> <p>25 Twitter followers is not and can't be a barometer</p>

<p style="text-align: right;">Page 174</p> <p>1 for -- a direct barometer for a purchaser's intent?</p> <p>2 MR. FRIEDMAN: Object to form.</p> <p>3 THE WITNESS: What do you mean by "direct</p> <p>4 barometer"?</p> <p>5 BY MR. SIMMONS:</p> <p>6 Q. You could be a fan of something and never</p> <p>7 purchase it, right?</p> <p>8 A. Yes, you could, technically.</p> <p>9 Q. You could be a fan of someone and not want</p> <p>10 to buy anything they are associated with, right?</p> <p>11 A. That would be unusual, but yes, it's</p> <p>12 plausible.</p> <p>13 Q. You could be a Twitter follower of an</p> <p>14 individual and not find their involvement in</p> <p>15 different projects a compelling reason to make a</p> <p>16 purchasing decision, right?</p> <p>17 A. There are lots of different reasons why</p> <p>18 someone might follow someone else on Twitter.</p> <p>19 Q. You could follow someone on Twitter and</p> <p>20 not be interested in purchasing products that they</p> <p>21 are involved with, right?</p> <p>22 A. Yes, presumably.</p> <p>23 Q. Mr. Orton's tattoos do not have Twitter</p> <p>24 accounts, do they?</p> <p>25 A. Not that I'm aware of.</p>	<p style="text-align: right;">Page 176</p> <p>1 popularity of his tattoos, right?</p> <p>2 A. Not directly, no.</p> <p>3 Q. It doesn't tell us anything indirectly</p> <p>4 either, does it?</p> <p>5 A. Well, I think the number of followers is</p> <p>6 an indication of his popularity.</p> <p>7 Q. It doesn't tell us anything about the</p> <p>8 popularity of his tattoos, right?</p> <p>9 A. My understanding of -- broad understanding</p> <p>10 of WWE followers or fans is that tattoos is a part</p> <p>11 of, I'm going to say broadly, the WWE culture.</p> <p>12 Q. You have changed the subject.</p> <p>13 So I'm asking you specifically about the</p> <p>14 number of Twitter followers Mr. Orton has.</p> <p>15 A. Uh-huh.</p> <p>16 Q. So my question is: The number of Twitter</p> <p>17 followers Mr. Orton has does not tell us anything</p> <p>18 about the popularity of his tattoos, right?</p> <p>19 MR. FRIEDMAN: Asked and answered.</p> <p>20 THE WITNESS: Just the number? Not</p> <p>21 necessarily.</p> <p>22 BY MR. SIMMONS:</p> <p>23 Q. So it does not, right?</p> <p>24 A. Not necessarily.</p> <p>25 Q. Well, it doesn't tell us that, right?</p>
<p style="text-align: right;">Page 175</p> <p>1 Q. Mr. Orton's Twitter followers wouldn't</p> <p>2 tell us anything about the popularity of any given</p> <p>3 tattoo, right?</p> <p>4 A. What do you mean?</p> <p>5 Q. Mr. Orton's Twitter followers are</p> <p>6 following Mr. Orton, not his tattoos, right?</p> <p>7 A. I would imagine that most of them, yes.</p> <p>8 Q. So we can't use his Twitter followers to</p> <p>9 tell us about the popularity of any given tattoo on</p> <p>10 Mr. Orton's person?</p> <p>11 A. The popularity of any given tattoo on his</p> <p>12 person. To answer that question, we would have to</p> <p>13 look at what his followers are tweeting about.</p> <p>14 Q. Well, but, you've reached conclusions</p> <p>15 based on the number of followers.</p> <p>16 So my question is: We can't tell from the</p> <p>17 number of followers of Mr. Orton on Twitter anything</p> <p>18 about the popularity of any of his tattoos, right?</p> <p>19 A. I don't believe I make that conclusion in</p> <p>20 my report.</p> <p>21 Q. Right. So just to be clear for the</p> <p>22 record, Mr. Orton's Twitter followers -- strike</p> <p>23 that.</p> <p>24 The number of Mr. Orton's Twitter</p> <p>25 followers does not tell us anything about the</p>	<p style="text-align: right;">Page 177</p> <p>1 MR. FRIEDMAN: Asked and answered.</p> <p>2 THE WITNESS: So in order to answer your</p> <p>3 question, I would have to know all of the</p> <p>4 reasons why Mr. Orton is popular. And it's</p> <p>5 plausible that one of the reasons he's popular</p> <p>6 is because fans of WWE think he has cool</p> <p>7 tattoos.</p> <p>8 BY MR. SIMMONS:</p> <p>9 Q. You don't reach that conclusion in your</p> <p>10 report, right?</p> <p>11 A. In my report, I believe I do comment that</p> <p>12 fans of the WWE think that Mr. Orton's tattoos are</p> <p>13 cool, in the broad sense of the term.</p> <p>14 Q. But you don't reach a conclusion that the</p> <p>15 number of -- strike that.</p> <p>16 A. But I don't make any conclusions about the</p> <p>17 popularity of his tattoos with regard to his number</p> <p>18 of Twitter followers. I do not make any conclusion</p> <p>19 of that sort.</p> <p>20 Q. You haven't evaluated the popularity of</p> <p>21 any specific tattoo on Mr. Orton's body at all,</p> <p>22 right?</p> <p>23 A. I have not.</p> <p>24 Q. You don't have an opinion as to whether</p> <p>25 one tattoo drives more sales than another tattoo, do</p>

<p style="text-align: right;">Page 178</p> <p>1 you?</p> <p>2 A. I do not have an opinion on that.</p> <p>3 Q. You do not have an opinion as to how much</p> <p>4 each individual tattoo contributes to the</p> <p>5 verisimilitude of WWE 2K, right?</p> <p>6 A. As stated in my report, no.</p> <p>7 Q. You are not aware of any fans saying that</p> <p>8 they purchased WWE 2K because of a particular tattoo</p> <p>9 on Randy Orton, right?</p> <p>10 A. Correct.</p> <p>11 Q. You're not aware of anyone saying that</p> <p>12 they would not license tattoos from Ms. Alexander</p> <p>13 because the tattoos appeared in WWE 2K, right?</p> <p>14 A. I don't have any knowledge of</p> <p>15 Ms. Alexander's business dealings.</p> <p>16 Q. You would agree with me that WWE 2K is not</p> <p>17 a substitute for Ms. Alexander's tattoos, right?</p> <p>18 A. A substitute? What do you mean by</p> <p>19 substitute?</p> <p>20 Q. No one is purchasing WWE 2K instead of</p> <p>21 getting tattooed by Ms. Alexander, right?</p> <p>22 A. I do not think so.</p> <p>23 Q. WWE 2K is not a substitute for the tattoos</p> <p>24 at issue in this case?</p> <p>25 A. Okay. Yes, I don't -- it does not seem to</p>	<p style="text-align: right;">Page 180</p> <p>1 would not make a difference from a purchasing</p> <p>2 perspective whether the game had achieved</p> <p>3 verisimilitude, right?</p> <p>4 A. Would not make a -- for what?</p> <p>5 Q. From a purchasing perspective.</p> <p>6 A. From a purchasing perspective?</p> <p>7 Q. I'll give it to you again.</p> <p>8 If WWE 2K's controls did not work well, it</p> <p>9 would not make a difference from a purchasing</p> <p>10 perspective whether the game had achieved</p> <p>11 verisimilitude, right?</p> <p>12 A. I think it would still matter to a certain</p> <p>13 extent.</p> <p>14 Q. Why is that?</p> <p>15 A. Mostly because I think there's lots of</p> <p>16 different reasons why someone might purchase a game.</p> <p>17 Some people may not care about the controls.</p> <p>18 Q. Would people care if the game was buggy?</p> <p>19 A. I think broadly speaking, yes. But there</p> <p>20 are levels of tolerance for that.</p> <p>21 Q. Have you played Half-Life?</p> <p>22 A. Yes, I have.</p> <p>23 Q. What is Half-Life?</p> <p>24 A. It's a video game.</p> <p>25 Q. What kind of video game?</p>
<p style="text-align: right;">Page 179</p> <p>1 be.</p> <p>2 MR. SIMMONS: All right. This seems like</p> <p>3 a good time for a break. Is that okay with</p> <p>4 everyone?</p> <p>5 THE VIDEOGRAPHER: We are going off the</p> <p>6 record at 11:45 a.m.</p> <p>7 (Thereupon, a lunch recess was taken,</p> <p>8 after which the following proceedings were</p> <p>9 held:)</p> <p>10 THE VIDEOGRAPHER: This is the beginning</p> <p>11 of DVD 4. We are back on the record at</p> <p>12 12:24 p.m.</p> <p>13 BY MR. SIMMONS:</p> <p>14 Q. Dr. Zagal, are you familiar with the work</p> <p>15 of Thomas Shaw?</p> <p>16 A. Thomas Shaw? Hmm. Possibly.</p> <p>17 Q. He's a role-playing game historian, right?</p> <p>18 A. Possibly. A lot of stuff I use in my</p> <p>19 academic work, I might just know the last name.</p> <p>20 Q. Are you familiar a role-playing historian</p> <p>21 named Shaw?</p> <p>22 A. It doesn't ring a bell, really.</p> <p>23 Q. Okay. Let me ask you some questions about</p> <p>24 WWE 2K.</p> <p>25 If WWE 2K's controls did not work well, it</p>	<p style="text-align: right;">Page 181</p> <p>1 A. I think people would call it generally a</p> <p>2 first-person shooter video game.</p> <p>3 Q. Is it set in a real-world setting?</p> <p>4 A. Real-world setting, but fictionalized?</p> <p>5 Q. Is one of its selling points realism?</p> <p>6 A. Nowadays?</p> <p>7 Q. No. When it was released.</p> <p>8 A. When it was released? I would speculate</p> <p>9 that yes, that was one of the reasons.</p> <p>10 Q. And it had particularly good physics for</p> <p>11 video games at that time, right?</p> <p>12 A. That was one of its features, yes.</p> <p>13 Q. Do you keep a game log?</p> <p>14 A. I do.</p> <p>15 Q. I'm going to show you a game log that you</p> <p>16 created for Half-Life. And I'm going to mark this</p> <p>17 as Deposition Exhibit 1 for the purposes of keeping</p> <p>18 track.</p> <p>19 (The referred-to document was marked by</p> <p>20 the court reporter for Identification as</p> <p>21 Deposition Exhibit 1.)</p> <p>22 BY MR. SIMMONS:</p> <p>23 Q. Is this a game log that you wrote?</p> <p>24 A. It does look like one, yes.</p> <p>25 Q. And this is a game log for Half-Life 2,</p>

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1 Episode 1, right?

2 A. It that's what the title says, yes.

3 Q. You wrote this. These are your words.

4 A. I believe they are.

5 Q. What is a game log?

6 A. So a game log in this context is, I would
7 say, a term that I coined. It's a blog about the
8 games that I play. And the main distinctiveness it
9 has with regards to a general blog is that it is
10 possible to organize them by game.

11 Q. Right.

12 And these are your views on playing this
13 game, right?

14 A. So this was posted in, if the date is
15 correct, in December of 2007. So I'd say these were
16 my --

17 THE REPORTER: I'm sorry. December of?

18 THE WITNESS: 2007. So I haven't read
19 this in a long time. My views might have
20 changed.

21 BY MR. SIMMONS:

22 Q. Okay. Let's take a look at it. If you
23 turn to the second page, there's paragraph that says
24 "at this time."

25 Do you see that?

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1 A. Yes.

2 Q. And you say that -- in the fourth
3 sentence, you say, "I think that part of what might
4 be going on is that the realistic representation,
5 including the physics, makes the 'obvious' game-play
6 elements less abstract and more 'real.'"

7 Do you see that?

8 A. Yes.

9 Q. And you go on to say that when faced with
10 the same puzzle, albeit more difficult, I wasn't
11 able to suspend my disbelief and focus on the
12 game-play over the realism.

13 Do you see that?

14 A. Yes.

15 Q. So you would agree that realism is not
16 always the driving force behind enjoyment of video
17 games by those playing them, right?

18 A. Yes.

19 Q. And sometimes the game-play is going to be
20 the major driving force with regard to that
21 enjoyment, true?

22 A. Yes. There are many factors driving
23 enjoyment for video games, yes.

24 Q. But the primary one is your ability to
25 actually play the game, right?

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1 A. Primarily for whom?

2 Q. Well, in this case, it was for you, right?

3 A. For me in this moment in the game, that's
4 what I seem to be saying, that I was focused on the
5 game-play over the realism.

6 Q. And that's true of most consumers: If the
7 game-play is not good, the realism doesn't really
8 matter, right?

9 A. So "game-play" is a very fuzzy term. It's
10 used by different people in different ways. So I
11 can refer to how I think I might have been using it
12 in this context.

13 I bring that up because people are -- game
14 fans argue online about what that means and what
15 they find to be, air quotes, "good game-play" or,
16 air quotes, "bad game-play."

17 Q. What did you mean here?

18 A. Let me reread the whole thing just so I
19 get the whole context.

20 Okay. Can you ask me the question again?

21 Q. What did you mean by "game-play" here?

22 A. So I think here I meant to -- game-play as
23 the things I get to do as a player, the things I get
24 to interact with, and the ways that I might interact
25 with those in-game elements.

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1 Q. And that was more important to you than
2 realism?

3 A. I don't think that fairly characterizes
4 the entirety of the post here.

5 Q. Did you or did you not say, "I wasn't able
6 to suspend my disbelief and focus on the game-play
7 over the realism"?

8 A. For that specific moment of game-play,
9 yes. But there are other elements where I kind of
10 do the opposite.

11 Q. But the point is, realism is not always
12 the primary factor in your game-play experience,
13 right?

14 A. The primary factor in?

15 Q. Your game-play experience.

16 A. So what I say is my game-play experience
17 is affected by lots of things. Sometimes some
18 things might come to the fore and some things might
19 not. They might come to the fore for good reasons
20 or they might come to the fore for bad reasons.

21 Q. Let's talk about your books. You have
22 three books, right?

23 A. At the moment, I have four.

24 Q. Okay. What's your fourth book?

25 A. It's called "Game Design Snacks." It's a

47 (Pages 182 to 185)

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1 book we wrote with a bunch of students.

2 Q. And what is it about?

3 A. It's about -- so we describe it as nuggets
4 of game design wisdom, intended to be easy to
5 consume and digest and understand.

6 Q. Has that book been published?

7 A. Yes.

8 Q. Where?

9 A. It was published by ETC Press.

10 Q. What is ETC Press?

11 A. ETC Press is a publisher, associated with
12 Carnegie Mellon University. I don't have an
13 understanding of what kind of corporation -- not
14 what kind of corporation -- what kind of
15 organization other than they are -- I would probably
16 characterize them as an academic publisher.

17 Q. Your other books are "Role-Playing Games,"
18 "Ethics," and "Games Education," right?

19 A. "Role-Playing Games," "Ethics In Games,"
20 "Games Education," yes.

21 Q. You have not written a book about realism
22 in video games, right?

23 A. Not specifically, no.

24 Q. You have not written a book about why
25 consumers buy certain video games, right?

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1 A. Not specifically, no.

2 Q. You have not written a book about
3 verisimilitude in video games, right?

4 A. Not specifically, no.

5 Q. You have not written a book about the
6 value of certain features in video games, right?

7 A. Not exclusively, no.

8 Q. You have not written a book about the
9 value to consumers of certain features in video
10 games, right?

11 A. Not exclusively, no.

12 Q. Have you written any books that discuss
13 consumer purchasing decisions for video games based
14 on verisimilitude?

15 A. Just to clarify that, some of the books on
16 that list are books -- are edited books that include
17 materials not written by myself.

18 Q. Uh-huh. And specifically, you did not
19 write the video game ethics book other than one
20 chapter, right?

21 A. I think the introduction, and I did put
22 the book together.

23 Q. But the other chapters are written by
24 other people?

25 A. Yes. So the authors of the chapters are

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1 listed in the book, and I do not claim authorship
2 over chapters that don't have my name on as author.

3 Q. Have you written any books that discussed
4 consumer purchasing decisions for video games based
5 on verisimilitude?

6 A. An entire book exclusively about that, no.

7 Q. Do you have any chapters of your books
8 that focus on consumer purchasing decisions for
9 video games based on verisimilitude?

10 A. So I have written and published things
11 where verisimilitude is discussed, yes. Are they
12 exclusively about that? No.

13 Q. Well, and I'm specifically asking about
14 the verisimilitude in the context of purchasing
15 decisions. You haven't written about that, right?

16 A. Not specifically, I don't think so.

17 Q. You have never published scholarly
18 articles about sports video games, have you?

19 A. Exclusively about sports video games, no,
20 I don't believe I have.

21 Q. You have never published scholarly
22 articles about wrestling video games, have you?

23 A. No.

24 Q. You have never published scholarly
25 articles about realism as a reason for people

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1 purchase video games, right?

2 A. No.

3 Q. Have you ever published scholarly articles
4 about licensing intellectual property for use in
5 video games?

6 A. No.

7 Q. Have you ever published scholarly articles
8 about video game marketing?

9 A. No. Exclusively about marketing, no.

10 Q. You have never published scholarly
11 articles about how different factors impact video
12 game sales, right?

13 A. I'm not sure.

14 Q. You can't think of an article right now,
15 though, right?

16 A. I could think of articles where that may
17 have been discussed, but I couldn't tell you offhand
18 without sort of looking at the article again.

19 Q. The impact of different factors on video
20 game sales is not a subject of your expertise,
21 right?

22 MR. FRIEDMAN: Object to form.

23 THE WITNESS: So I am an expert in video
24 games, and so I have knowledge about a lot of
25 things related to video games.

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1 BY MR. SIMMONS:

2 Q. But you haven't studied specifically the
3 impact of different factors on video game sales,
4 right?

5 MR. FRIEDMAN: Object to form.

6 THE WITNESS: Specifically written only
7 about that in an article, no.

8 BY MR. SIMMONS:

9 Q. You don't have any degrees in cultural
10 studies, do you?

11 A. No.

12 Q. You don't have degrees in media studies,
13 do you?

14 A. No.

15 Q. You don't have degrees in marketing?

16 A. No. A degree, no.

17 Q. You don't have degrees in business?

18 A. Hmm. No. With that name, no.

19 Q. You are not a lawyer, are you?

20 A. No.

21 Q. You are not an economist?

22 A. No.

23 Q. You are not an accountant?

24 A. No.

25 Q. You are not a consumer behavior expert?

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1 A. Broadly, as a consumer behavior expert,
2 or -- ah, no.

3 Q. You do not work in video game marketing,
4 do you?

5 A. Not currently.

6 Q. Have you ever worked in video game
7 marketing?

8 A. I did work at an interactive media agency
9 that did do video game-related work.

10 Q. You weren't in the marketing group, were
11 you?

12 A. I think marketing was cross cutting.

13 Q. But you weren't in the marketing group,
14 right?

15 A. I don't know that this company had a
16 specific marketing group.

17 Q. But you were in -- you were working in a
18 technical capacity, right?

19 A. Hmm, no, actually.

20 Q. Okay. What was your role?

21 A. I was brought on as someone who was
22 knowledgeable about games and game culture,
23 knowledgeable about online communities and online
24 culture, and had a background, work experience in
25 those kinds of areas, including business to consumer

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1 type enterprises, business -- business-to-business,
2 let's say.

3 Q. Did you create any marketing campaigns
4 while you worked -- what company was this that?

5 A. Studiocom.

6 Q. Did you work -- create any marketing
7 campaigns for Studiocom?

8 A. As a sole creator, no.

9 Q. Did you draft Studiocom's marketing?

10 A. The entirety, no.

11 Q. Were you the primary drafter on
12 Studiocom's marketing?

13 A. I would say that I participated in a
14 couple of Studiocom's marketing efforts, or -- the
15 work that they were doing for other people, that was
16 marketing related.

17 Q. How many marketing projects did you work
18 on?

19 A. At Studiocom?

20 Q. Yes.

21 A. I think more than two, but fewer than
22 five.

23 Q. Were you a full-time employee at
24 Studiocom?

25 A. So I only worked there during the summers,

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1 and while I was there, I was full time.

2 Q. But you didn't work there for nine months
3 of the year?

4 A. No. I worked only during the summer, I
5 believe it was three months.

6 Q. And at that time you were in graduate
7 school, right?

8 A. Yes.

9 Q. And what was your title?

10 A. At Studiocom?

11 Q. Yes.

12 A. What did I list on my CV?

13 Q. Would it sound right if I said you were
14 the director of community development?

15 A. If that is what I put on my CV, then that
16 is what I believe my role was.

17 Q. So your role was focusing on the video
18 game community, not on marketing, right?

19 A. I don't think anybody at Studiocom had a
20 marketing title.

21 Q. What was Studiocom?

22 A. So Studiocom is -- was at that time, think
23 of it as an ad agency. So they were helping other
24 companies market their stuff, and they had a focus
25 on interactive and online.

49 (Pages 190 to 193)

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1 So to give an example, they built and
2 designed an online virtual world for Coke,
3 Coca-cola. That was part of Coke's marketing
4 efforts. I believe it was called World of Coke.
5 People could sign up and play this game, participate
6 in this online social space and engage with the
7 brand of Coca-cola.

8 Q. But that was not -- Coca-cola wasn't
9 selling a video game, right?

10 A. No. I don't believe they were selling a
11 video game.

12 Q. Did you work on any marketing for video
13 games at Studiocom?

14 A. I don't think I have worked for any
15 companies that were selling video games as a
16 product.

17 Q. Are you familiar with E3 Expo?

18 A. Yes.

19 Q. Have you ever been?

20 A. No.

21 Q. What is the E3 Expo?

22 A. It is a trade event, is how I would
23 describe it.

24 Q. It is a video game --

25 A. Yes, video game industry trade event.

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1 Q. And it is attended by a number of US-based
2 and foreign video game companies, right?

3 A. Yes.

4 Q. You are not a licensing expert, are you?

5 A. Licensing, broadly speaking, no.

6 Q. You don't work in professional wrestling,
7 do you?

8 A. No.

9 Q. You have not studied wrestling?

10 A. What do you mean by "studied"?

11 Q. Written academic articles about?

12 A. No, I have not written academic articles
13 about wrestling.

14 Q. Have you taught any courses about
15 wrestling?

16 A. I have not taught any courses about
17 wrestling.

18 Q. Have you written any books about
19 wrestling?

20 A. I have not written any books about
21 wrestling.

22 Q. Have you ever conducted demographic
23 studies of the WWE fan base?

24 A. No.

25 Q. Have you ever negotiated a license?

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1 A. Yes, actually.

2 Q. Have you ever negotiated a license for a
3 video game?

4 A. No.

5 Q. You don't have any licensing
6 certifications, do you?

7 A. No.

8 Q. You have no affiliation with WWE, do you?

9 A. No.

10 Q. You have had no communications with anyone
11 at WWE, have you?

12 A. Not expressly -- I might have been at some
13 point in time a member of their mailing list or, so,
14 in that sense, maybe. But ...

15 Q. But other than being a member of WWE's
16 mailing list, you have never communicated with its
17 website or its employees?

18 A. Or a member of their website, but not
19 directly I'm talking to a specific person at WWE.

20 Q. Certainly you have never talked to them in
21 a professional capacity?

22 A. No.

23 Q. You don't have affiliation with Take-Two
24 Interactive Software or 2K Games, right?

25 A. No.

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1 Q. You have never communicated with anyone at
2 Take-Two or 2K Games, right?

3 A. So I have a lot of students and former
4 students. And I believe there is at least a handful
5 that work at Take-Two or affiliates or subsidiaries.
6 So in that sense, I may have.

7 Q. Who of your students work at Take-Two or
8 2K Games?

9 A. I don't know off the top of my head. I
10 have students who worked at. They may not work
11 there anymore is what I'm saying.

12 Q. Have you ever spoken to an employee of
13 Take-Two or 2K Games in your official capacity?

14 A. My official capacity as a what?

15 Q. In your professional capacity.

16 A. Yes, it is likely.

17 Q. In what circumstance?

18 A. So I regularly attend the game developers
19 conference, which is a games-industry event that is
20 attended by a lot of games industry professionals.
21 And in that context, it is entirely possible that I
22 may have met or talked to employees of Take-Two.

23 And I'm at the conference as a game
24 professor. So in that sense, I am in my
25 professional capacity. But I would describe these

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<p>1 as sort of incidental. You know, we were chatting</p> <p>2 about a game that came out or a talk that someone</p> <p>3 gave, that sort of thing.</p> <p>4 Q. So other than incidental communications at</p> <p>5 this conference, have you ever spoken to Take-Two or</p> <p>6 2K's employees in your professional capacity?</p> <p>7 A. I would say probably not.</p> <p>8 Q. Do you have any affiliation with Yuke's or</p> <p>9 Yuke's LA?</p> <p>10 A. No.</p> <p>11 Q. Do you know who is Yuke's and Yuke's LA</p> <p>12 are?</p> <p>13 A. Generally speaking, yes.</p> <p>14 Q. What are they?</p> <p>15 A. A game company.</p> <p>16 Q. What do they create?</p> <p>17 A. Games. Video game.</p> <p>18 Q. What kind of video games?</p> <p>19 A. All kinds. I think -- I mean, I think</p> <p>20 some of the games are wrestling related.</p> <p>21 Q. Have you had any professional</p> <p>22 communications with anyone at Yuke's?</p> <p>23 A. I would say my answer would be the same as</p> <p>24 for Take-Two.</p> <p>25 Q. So, other than potential incidental</p>	<p>1 that tattoo.</p> <p>2 Q. The Hangover -- the tattoo in the Hangover</p> <p>3 2 film was not -- the issue in that case was not</p> <p>4 about the tattoo being on the person who bears it in</p> <p>5 real life, right?</p> <p>6 A. Yes. So the person -- yeah, it was a</p> <p>7 tattoo on one of the movie's characters.</p> <p>8 Q. But the tattoo that was placed on Ed Helms</p> <p>9 in the Hangover 2 was not a tattoo that Ed Helms had</p> <p>10 in real life, right?</p> <p>11 A. So the character that had the tattoo in</p> <p>12 the movie did not have that tattoo in real life,</p> <p>13 yes.</p> <p>14 Q. So are you aware of any company licensing</p> <p>15 tattoos to be used in photographs of the people who</p> <p>16 bear them in real life?</p> <p>17 A. So I could not give you the name of the</p> <p>18 company that that is what they do.</p> <p>19 Q. You are not aware of such a license?</p> <p>20 A. Of such a company -- if you were to ask</p> <p>21 me, do you think these licenses exist?</p> <p>22 Q. No. That is not my question.</p> <p>23 A. Okay.</p> <p>24 Q. My question is whether you are aware of</p> <p>25 any company licensing tattoos to be used in</p>
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<p>1 conversations at this video game conference, you</p> <p>2 have never had a professional communication with a</p> <p>3 Yuke's or Yuke's LA's employee, right?</p> <p>4 A. Or former students that may or may not be</p> <p>5 currently employed at Yuke's, so other than that.</p> <p>6 Q. Are you aware of a video game company ever</p> <p>7 licensing tattoos to be used on the people that bear</p> <p>8 them in real life in their video games?</p> <p>9 A. No, I'm not aware.</p> <p>10 Q. Are you aware of any company licensing</p> <p>11 tattoos to be used in photographs of the people who</p> <p>12 bear them in real life?</p> <p>13 A. So I know there is a case of a movie.</p> <p>14 Q. A lawsuit?</p> <p>15 A. Yes, a lawsuit, a legal case.</p> <p>16 Q. There was no license for the tattoos in</p> <p>17 that case, right?</p> <p>18 A. I don't recall the details of the case,</p> <p>19 but it was a case involving someone having in the</p> <p>20 movie -- I think it was The Hangover.</p> <p>21 Q. Uh-huh.</p> <p>22 A. Ew, which one?</p> <p>23 One of the Hangover movies. A character</p> <p>24 in the movie got a tattoo on their face as part of</p> <p>25 the movie's plot. And there was a lawsuit involving</p>	<p>1 photographs of the people who bear them in real</p> <p>2 life?</p> <p>3 A. I'm not aware of a specific company that</p> <p>4 does only that.</p> <p>5 Q. But you are not aware of anyone who has</p> <p>6 ever licensed a tattoo to be used on a person in the</p> <p>7 photograph of the person who bore it in real life,</p> <p>8 right?</p> <p>9 A. Of a specific case, no. But I imagine it</p> <p>10 happens.</p> <p>11 Q. That is supposition, right?</p> <p>12 A. It is informed supposition.</p> <p>13 Q. But you have no license that you can point</p> <p>14 to, right?</p> <p>15 A. Not a specific license, no.</p> <p>16 Q. Are you aware of any time that a tattoo</p> <p>17 has been licensed for use in an audio-visual work on</p> <p>18 the person who bore that tattoo in real life?</p> <p>19 A. Can you restate that, please? I'm trying</p> <p>20 to process that.</p> <p>21 Q. Are you aware of at any time that a tattoo</p> <p>22 has been licensed for use in a audio-visual work on</p> <p>23 the person who bore that tattoo in real life?</p> <p>24 A. So I think some tattoo artists might</p> <p>25 license their tattoos to people.</p>

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<p>1 Q. But you don't know of anyone who has</p> <p>2 actually done that, do you?</p> <p>3 A. Not specifically, no.</p> <p>4 Q. So the answer to my question -- strike</p> <p>5 that.</p> <p>6 So are you aware of any time that a tattoo</p> <p>7 has been licensed for use in audio-visual work on</p> <p>8 the person who bore that tattoo in real life?</p> <p>9 A. I'm not aware of that specific case.</p> <p>10 Q. Ms. Alexander has never licensed her</p> <p>11 tattoos for depiction in a video game, right?</p> <p>12 A. I don't no idea if she has or has not.</p> <p>13 Q. You haven't analyzed it?</p> <p>14 A. I have not talked to Ms. Alexander.</p> <p>15 Q. Do you know anything about Ms. Alexander's</p> <p>16 licensing history?</p> <p>17 A. No.</p> <p>18 Q. Would you agree with me that if Ms.</p> <p>19 Alexander had licensed her tattoos, that would</p> <p>20 provide a barometer for any value associated with</p> <p>21 her tattoos?</p> <p>22 MR. FRIEDMAN: Objection, calls for</p> <p>23 speculation.</p> <p>24 THE WITNESS: So if Ms. Alexander had</p> <p>25 licensed her tattoos, would she have a better</p>	<p>1 Q. So when you say that his tattoos or his</p> <p>2 appearance in video games are important to him, that</p> <p>3 is based on interviews he's done over the years,</p> <p>4 right?</p> <p>5 A. Yes.</p> <p>6 Q. And --</p> <p>7 A. Well, not just interviews. Based on</p> <p>8 information that was publicly available to me when I</p> <p>9 searched for it.</p> <p>10 Q. How does Mr. Orton's opinion regarding his</p> <p>11 appearance in WWE 2K impact WWE 2K's sales?</p> <p>12 A. I think there is some amount of</p> <p>13 speculation there. If Mr. Orton is happy about his</p> <p>14 appearance in this game and he makes public</p> <p>15 statements to that effect, I think that can drive</p> <p>16 sales, that can be a positive driver for sales.</p> <p>17 If he were to do the opposite, that might</p> <p>18 have a negative effect on sales.</p> <p>19 Q. And didn't Mr. Orton actually criticize</p> <p>20 WWE 2K's portrayal of him in the press?</p> <p>21 A. I believe there is a tweet that I referred</p> <p>22 to in my report, yes.</p> <p>23 Q. And the tweet shows an image of him from</p> <p>24 the game and he says -- he's critical of it, right?</p> <p>25 A. Uh-huh. That is what it looks like.</p>
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<p>1 sense of her tattoo's values? That seems</p> <p>2 likely.</p> <p>3 BY MR. SIMMONS:</p> <p>4 Q. Past licensing by an artist is a way of</p> <p>5 determining what works created by that artist can be</p> <p>6 valued at, right?</p> <p>7 A. It can be used for that, yes.</p> <p>8 Q. Would you agree with me that it would be</p> <p>9 difficult to track down the tattooists for every</p> <p>10 tattoo in WWE 2K?</p> <p>11 A. I'm not a licensing person, so I really</p> <p>12 don't have a way to gauge what a licensing person</p> <p>13 would consider hard or complicated or not.</p> <p>14 Q. You haven't thought about it?</p> <p>15 A. I have not thought about it.</p> <p>16 Q. You didn't interview Mr. Orton as part of</p> <p>17 preparing your report, did you?</p> <p>18 A. I did not talk to Mr. Orton.</p> <p>19 Q. You have never talked to Mr. Orton, right?</p> <p>20 A. I have never talked to Mr. Orton.</p> <p>21 Q. All right. I have to ask the question and</p> <p>22 then you can answer, or the court reporter will get</p> <p>23 mad at us.</p> <p>24 You have never talked to Mr. Orton, right?</p> <p>25 A. I have never talked to Mr. Orton.</p>	<p>1 Q. So other than statements by Mr. Orton,</p> <p>2 public statements by Mr. Orton, whether or not he --</p> <p>3 whether or not his appearance in the game is</p> <p>4 important to him doesn't drive sales, right?</p> <p>5 A. I mean, if he has an opinion and never</p> <p>6 communicates that, then there is no way -- well,</p> <p>7 hmm. I can imagine a case where Mr. Orton might be</p> <p>8 unhappy with his portrayal in a game, and thus</p> <p>9 decide to not make any future appearances in the</p> <p>10 game. And assuming that was contractually possible,</p> <p>11 that could have a negative effect on sales.</p> <p>12 Q. So you are going outside the scope of my</p> <p>13 question. I just want to ask about his view of his</p> <p>14 own appearance.</p> <p>15 Does that drive sales? Not other things</p> <p>16 he might do because of his opinion.</p> <p>17 A. I think if he makes public statements</p> <p>18 about that, then that can have an affect on sales.</p> <p>19 Q. But statements he's making, not the fact</p> <p>20 that it is important to him?</p> <p>21 A. Well, I think the way to know his</p> <p>22 opinion -- like, I can't know his opinion if he</p> <p>23 doesn't say anything about it, if he doesn't</p> <p>24 communicate something about it.</p> <p>25 Q. Is it your view that there would be --</p>

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<p>1 that there would be negative backlash by fans of Mr. 2 Orton if he did not appear with his tattoos in WWE 3 2K?</p> <p>4 A. I believe there would be a negative press 5 and negative commentary online.</p> <p>6 Q. And is it your view that would negatively 7 impact sales?</p> <p>8 A. Yes, I think that.</p> <p>9 Q. What is your basis for that?</p> <p>10 A. My knowledge and experience of video 11 games, of video game culture. My capacity as an 12 expert in those matters. We could also add my 13 knowledge of online culture, and the role that some 14 of that plays in the success or not the success of 15 products.</p> <p>16 There are other games that have been less 17 successful commercially due to negative word of 18 mouth, for example, as seen online.</p> <p>19 Q. Anything else?</p> <p>20 A. Well, it is also the stuff I looked at for 21 this report.</p> <p>22 Q. Anything else?</p> <p>23 A. Let's see, what did I say?</p> <p>24 Q. You said, I'm going to ask you a better 25 question.</p>	<p>1 Q. You haven't tried to generate any kind of 2 statistics about purchasing behavior of WWE 2K based 3 on Mr. Orton's appearance in the game, right?</p> <p>4 A. What do you mean "generate statistics"?</p> <p>5 Q. Like create a statistical analysis of any 6 kind.</p> <p>7 A. No, I have not.</p> <p>8 Q. It is your view that if Mr. Orton's 9 tattoos had not been included in WWE 2K, it would 10 have affected sales, right?</p> <p>11 A. I believe I'd say so in the report, yes.</p> <p>12 Q. By how much?</p> <p>13 A. I do not make any claims about how much in 14 the report.</p> <p>15 Q. Because you don't know?</p> <p>16 A. Yes, I do not know.</p> <p>17 Q. So as far as you know, if Mr. Orton's 18 tattoos didn't appear in WWE 2K and it was otherwise 19 completely the same, the effect on purchasing could 20 be minimal, right?</p> <p>21 A. Well, it depends on what you mean by 22 "minimal."</p> <p>23 Q. Low dollar value.</p> <p>24 A. Low as in \$5.00? Or low as in --</p> <p>25 Q. It could not affect it at all, right?</p>
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<p>1 Is there anything other than your 2 knowledge and experience of video games and video 3 game culture, your knowledge of online culture, the 4 role that some of that plays with success, or not, 5 of products, and the articles cited in your report, 6 just from the basis for your view that a negative 7 press and negative commentary about WWE 2K because 8 Mr. Orton did not appear in the game would 9 negatively impact sales?</p> <p>10 A. Except also I'd add my knowledge of the 11 games in the industry, both current and past.</p> <p>12 Q. Anything else?</p> <p>13 A. I think those would be the main things.</p> <p>14 Q. You didn't commission a study on what 15 purchasing would be like for a version of WWE 2K 16 without Randy Orton in it right?</p> <p>17 A. No, I did not conduct a study.</p> <p>18 Q. You don't know how much sales would be 19 negatively impacted, do you?</p> <p>20 A. No.</p> <p>21 Q. You haven't created a version of WWE 2K 22 without Mr. Orton in it, and then run a survey to 23 see what people think about it, have you?</p> <p>24 A. I have not created a version of WWE 25 Wrestling and then done a study on it, no.</p>	<p>1 A. It is possible.</p> <p>2 Q. Now, you wrote an initial report, a 3 supplemental report and rebuttal report in this 4 case, right?</p> <p>5 A. Is the rebuttal the one in response to 6 Dr. Ian Bogost?</p> <p>7 Q. Right. It is called Responsive. 8 Responsive report, right?</p> <p>9 A. Yes.</p> <p>10 Q. So there are three reports that you have 11 written?</p> <p>12 A. Yes.</p> <p>13 Q. Are all of the opinions that you have in 14 this case in those reports?</p> <p>15 A. Are all of the opinions, what?</p> <p>16 Q. Are all of the opinions that you intend to 17 offer in this case included in those reports?</p> <p>18 A. I'm not sure what you mean by that. Are 19 you saying do I have more opinions?</p> <p>20 Q. You do not intend to at trial provide 21 opinions that have not been disclosed in your three 22 expert reports, right?</p> <p>23 A. So I stand by the reports.</p> <p>24 Q. Is that a yes to my question?</p> <p>25 A. So at this moment in time, I don't feel</p>

<p style="text-align: right;">Page 210</p> <p>1 the need to add anything to the reports.</p> <p>2 Q. Okay. Are you expecting to add something</p> <p>3 to your reports?</p> <p>4 A. No.</p> <p>5 Q. Okay.</p> <p>6 Your conclusions in the three reports are</p> <p>7 not based on survey evidence, right?</p> <p>8 A. My conclusions on the reports are based on</p> <p>9 the things that I cite in the report.</p> <p>10 Q. And those are all the bases for your</p> <p>11 conclusions, right?</p> <p>12 A. The fundamental bases.</p> <p>13 Q. You don't have bases for your opinions in</p> <p>14 your report beyond what you have disclosed to us in</p> <p>15 discovery, right?</p> <p>16 A. So we have been over this before, where</p> <p>17 there are things that I looked at that I think</p> <p>18 played a part in opinion that aren't in the report.</p> <p>19 Let me give you an example.</p> <p>20 I might do a Google search and I get 10</p> <p>21 hits only, 10 findings. And I look at all 10 of</p> <p>22 them and say, okay, all 10 of these say, hey, Randy</p> <p>23 Orton is a really popular guy.</p> <p>24 And so I pick the one that I think is the</p> <p>25 most relevant or significant. I didn't cite all of</p>	<p style="text-align: right;">Page 212</p> <p>1 BY MR. SIMMONS:</p> <p>2 Q. But you haven't written any academic</p> <p>3 literature connecting the number of Twitter</p> <p>4 followers someone has to purchasing decisions,</p> <p>5 right?</p> <p>6 A. No. I have not written anything like</p> <p>7 that.</p> <p>8 Q. You haven't written any academic articles</p> <p>9 or books or literature connecting the number of</p> <p>10 Twitter followers someone has to their popularity,</p> <p>11 have you?</p> <p>12 A. I have not written, no.</p> <p>13 Q. And you don't cite any studies connecting</p> <p>14 those two things, do you?</p> <p>15 A. I believe I do not cite any</p> <p>16 Twitter-related studies in my report. Excuse me.</p> <p>17 Q. You didn't conduct your own investigation</p> <p>18 of WWE 2K by conducting interviews, did you?</p> <p>19 A. I did not conduct interviews for writing</p> <p>20 my report.</p> <p>21 Q. You mentioned before that you played WWE</p> <p>22 2K even before and in preparing your report, right?</p> <p>23 A. I played it for preparing -- and when you</p> <p>24 say "WWE 2K," you are referring to a specific</p> <p>25 title?</p>
<p style="text-align: right;">Page 211</p> <p>1 them, but the other nine, basically confirm or</p> <p>2 support or sort of basically say the same thing.</p> <p>3 Q. But you didn't include those in your</p> <p>4 report, right?</p> <p>5 A. No.</p> <p>6 Q. The conclusions in your report are not</p> <p>7 based on a statistical analysis, are they?</p> <p>8 A. Exclusively, no.</p> <p>9 Q. There are statistics in your reports,</p> <p>10 right?</p> <p>11 A. Only as to the Twitter followers, and I do</p> <p>12 make a comparison. So some people would call that a</p> <p>13 numerically-based analysis.</p> <p>14 Q. Are you an expert in determining what the</p> <p>15 meaning of Twitter followers is to purchasing</p> <p>16 behavior?</p> <p>17 MR. FRIEDMAN: Object to form.</p> <p>18 THE WITNESS: I would not say that I'm an</p> <p>19 expert on Twitter in the academic sense. But I</p> <p>20 would say that I am -- I have been a Twitter</p> <p>21 user for a while now, and I have read research</p> <p>22 on Twitter and Twitter's use.</p> <p>23 So in that sense, I would say I'm not the</p> <p>24 same as a regular Twitter person, Twitter user.</p> <p>25</p>	<p style="text-align: right;">Page 213</p> <p>1 Q. The line of WWE 2K games, yes.</p> <p>2 A. Yes. I have played WWE games prior to</p> <p>3 writing my report or being engaged for this case.</p> <p>4 Q. And you actually played WWE 2K, correct?</p> <p>5 A. I believe that is one of the titles that I</p> <p>6 played.</p> <p>7 Q. Where did you play WWE 2K?</p> <p>8 A. In my home.</p> <p>9 Q. And did you play it on a computer or did</p> <p>10 you play it on a -- on a television console sort of</p> <p>11 situation?</p> <p>12 A. I played it on my Play Station 4.</p> <p>13 Q. I just bought one. I'm very excited.</p> <p>14 What size television did you play the game</p> <p>15 on?</p> <p>16 A. Oh, I don't know -- I don't recall the</p> <p>17 size of my television. I'm looking at a TV over</p> <p>18 there. I would say my television is smaller than</p> <p>19 that, but not significantly.</p> <p>20 Q. So somewhere in the like 36- to 45-inch</p> <p>21 range, approximately?</p> <p>22 A. I'm really bad with inches.</p> <p>23 MR. SIMMONS: I will just the ask</p> <p>24 videographer can you pan the screen over to</p> <p>25 this TV, so we at least have the image on the</p>

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<p>1 video.</p> <p>2 THE WITNESS: The tissue box for</p> <p>3 reference.</p> <p>4 MR. SIMMONS: Yes, there you go.</p> <p>5 All right. Thank you.</p> <p>6 BY MR. SIMMONS:</p> <p>7 Q. Would you say you have an average</p> <p>8 television?</p> <p>9 A. Yes. I wouldn't say -- I would not say</p> <p>10 that my television is -- I do not have a current</p> <p>11 bleeding edge, top of the line television.</p> <p>12 Q. And most people don't, right?</p> <p>13 A. I would say most people don't.</p> <p>14 Q. Now, when you played WWE 2K, the wrestlers</p> <p>15 appeared smaller than they did in real life, right?</p> <p>16 A. Sometimes, yes.</p> <p>17 Q. When they were wrestling in the ring, they</p> <p>18 are not life size, right?</p> <p>19 A. My television is not that big. But there</p> <p>20 are moments where it zooms in and they might be.</p> <p>21 Q. But when they are wrestling in the ring,</p> <p>22 they are a certain number of inches high as opposed</p> <p>23 to real life, right?</p> <p>24 A. Yes, so there are views on the TV screen</p> <p>25 when they are smaller than their real life</p>	<p>1 copyright infringement claim in this case has to do</p> <p>2 specifically with the tattoos at issue?</p> <p>3 A. Well --</p> <p>4 Q. So I will try it again.</p> <p>5 Do you understand that the copyright claim</p> <p>6 at issue here has to do with only copying the</p> <p>7 tattoos Ms. Alexander inked on Mr. Orton?</p> <p>8 A. So it is my understanding that Ms.</p> <p>9 Alexander, that that is the claim that she's making,</p> <p>10 that there has been copyright infringement with</p> <p>11 regards to the copies of the tattoos that appear.</p> <p>12 Q. In your report, in your report you do not</p> <p>13 analyze the tattoos separately, right?</p> <p>14 A. I believe I didn't.</p> <p>15 Q. And you don't analyze Ms. Alexander's</p> <p>16 tattoos separately from any other tattoos Mr. Orton</p> <p>17 has?</p> <p>18 A. I did not analyze the other tattoos in</p> <p>19 that way, no, I don't think I did.</p> <p>20 Q. Your view is that players care more about</p> <p>21 verisimilitude in wrestling games than in other</p> <p>22 games, right?</p> <p>23 A. I don't think I made that claim.</p> <p>24 Q. Okay.</p> <p>25 A. I think I made the claim that</p>
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<p>1 counterparts, yes.</p> <p>2 Q. And when you look at the tattoos, they are</p> <p>3 similarly reduced when they are seen on the screen,</p> <p>4 right?</p> <p>5 A. When the character on the screen is</p> <p>6 smaller than real life, I would expect the tattoos</p> <p>7 to be smaller than in real life, but in the same</p> <p>8 proportion.</p> <p>9 Q. One of the things that you look at in</p> <p>10 terms of Mr. Orton's popularity is how often he's</p> <p>11 appeared in WWE games, right?</p> <p>12 A. Yes. I believe I commented in my report</p> <p>13 on the general sense of how many games he's appeared</p> <p>14 in.</p> <p>15 Q. You cited an article that said he was the</p> <p>16 23rd most appearing player, right?</p> <p>17 A. Yes. I believe so.</p> <p>18 Q. And so he's not in the top 20 players in</p> <p>19 WWE games, right?</p> <p>20 A. According to that article and for the</p> <p>21 moment of time when that article was placed, I</p> <p>22 imagine that may be correct.</p> <p>23 Q. As far as you know that is --</p> <p>24 A. As far as I know.</p> <p>25 Q. Is it your understanding that the</p>	<p>1 verisimilitude matters in the case of wrestling</p> <p>2 games.</p> <p>3 Q. And why is that?</p> <p>4 A. You can refer to the report.</p> <p>5 Q. Okay.</p> <p>6 Other than what is -- strike that.</p> <p>7 Okay. You agree with Dr. Bogost that the</p> <p>8 WWE 2K games are large, right?</p> <p>9 A. Dr. Bogost uses large in many different</p> <p>10 ways in his report. So which ones do you mean</p> <p>11 specifically?</p> <p>12 Q. Well, as a type of video game, it is a big</p> <p>13 video game, right?</p> <p>14 A. But what you mean by "big"?</p> <p>15 Q. In terms of content inside the game, there</p> <p>16 is a lot of content, right?</p> <p>17 A. So, say, yes, it is a game that has a lot</p> <p>18 of characters and a lot of game modes, yes.</p> <p>19 Q. And more than other games, right?</p> <p>20 A. Hmm.</p> <p>21 Q. Certainly more than Tetris, right?</p> <p>22 A. There is a new version of Tetris that came</p> <p>23 out that has a lot of game boards. I'm not familiar</p> <p>24 with the last version of Tetris, how many boards it</p> <p>25 has.</p>

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<p>1 Q. Tetris doesn't have characters, does it?</p> <p>2 A. As far as I know, it is not.</p> <p>3 Q. As games go, it is creative, but it is</p> <p>4 simpler than WWE 2K, right?</p> <p>5 A. It depends on what you mean by "simpler."</p> <p>6 Q. Okay. Let me try it again.</p> <p>7 Are you familiar with the game Pong?</p> <p>8 A. Yes, I'm familiar with the game Pong.</p> <p>9 Q. Is WWE 2K more complex than Pong?</p> <p>10 A. It is more -- along most metrics, I would</p> <p>11 say it is more complex -- I'm sorry. WWE is more</p> <p>12 complex than Pong, in case I used the wrong word.</p> <p>13 Q. Is WWE 2K on the spectrum of sports games</p> <p>14 that have existed more graphically dynamic than</p> <p>15 prior --</p> <p>16 A. What do you mean by "dynamic"?</p> <p>17 Q. More dynamic elements, more characters,</p> <p>18 more settings, more aspects to the game.</p> <p>19 A. I would imagine that the newest version of</p> <p>20 WWE has features added that were not present in</p> <p>21 prior games. Whether or not it has more characters,</p> <p>22 at this point, I'm not sure, to be honest.</p> <p>23 Q. If you were going to estimate how many</p> <p>24 lines of code it took to write WWE 2K, what would</p> <p>25 you estimate it being?</p>	<p>1 A. I haven't bothered to do a thorough</p> <p>2 analysis of his estimation and done my own analysis</p> <p>3 and compared those.</p> <p>4 Q. But Dr. Bogost's estimate sounds right to</p> <p>5 you, right?</p> <p>6 A. It is a number, really.</p> <p>7 Q. Right. And it is --</p> <p>8 A. I couldn't tell you if it is a -- if it is</p> <p>9 a plausible number or not.</p> <p>10 Q. But Dr. Bogost's analysis could be</p> <p>11 replicated, correct?</p> <p>12 A. I would have to look at his report again.</p> <p>13 My recollection is that his -- the details of his</p> <p>14 analysis are not thorough enough that they could</p> <p>15 replicated independently without knowledge of his</p> <p>16 analysis.</p> <p>17 Q. But they could replicate it without</p> <p>18 knowledge of his analysis, right?</p> <p>19 A. I think someone could look at this</p> <p>20 analysis the way he described it and understand what</p> <p>21 steps he was following. They might agree or</p> <p>22 disagree on certain of the assumptions that</p> <p>23 Dr. Bogost makes, as well as some estimates that he</p> <p>24 makes.</p> <p>25 Q. But you're not opining on that in this</p>
Page 219	Page 221
<p>1 A. I would say I have no idea.</p> <p>2 Q. You couldn't say one way or the other?</p> <p>3 A. I would imagine a fair amount of code,</p> <p>4 enough it would take several programmers a year to</p> <p>5 write and test and so on.</p> <p>6 Q. And you would agree that Mr. Orton's</p> <p>7 in-game tattoos are a small part of that code,</p> <p>8 right?</p> <p>9 A. I would say his tattoos are probably not</p> <p>10 computer code.</p> <p>11 Q. They are images in the files directory,</p> <p>12 right?</p> <p>13 A. They are most likely data.</p> <p>14 Q. Okay. The data comprising the in-game</p> <p>15 tattoos is a small part of WWE 2K, right?</p> <p>16 A. I don't know for sure. I haven't examined</p> <p>17 the files and compared the size of the files related</p> <p>18 to tattoos, to all of the other files.</p> <p>19 Q. You are aware that Dr. Bogost estimated it</p> <p>20 at being -- that the tattoos being 0.0008 percent of</p> <p>21 the WWE 2K computer program, right?</p> <p>22 A. If that is what his report says, then,</p> <p>23 yes.</p> <p>24 Q. And you have no reason to disagree with</p> <p>25 Dr. Bogost's estimation, right?</p>	<p>1 case, right?</p> <p>2 A. No, not exclusively.</p> <p>3 Q. Or implicitly, right?</p> <p>4 A. Well, I think that Dr. Bogost's analysis</p> <p>5 misses the point.</p> <p>6 Q. Right.</p> <p>7 But you're not taking issue with his</p> <p>8 estimation of the size of the tattoos in relation</p> <p>9 to the video game as a whole, right? His</p> <p>10 estimation?</p> <p>11 A. I neither agree nor disagree.</p> <p>12 Q. You're not addressing it?</p> <p>13 A. No.</p> <p>14 Q. You said the fact that it is a small</p> <p>15 portion of the game -- or Dr. Bogost concludes that</p> <p>16 it is a small portion of the game misses the point.</p> <p>17 A. Uh-huh.</p> <p>18 Q. Why do you say that?</p> <p>19 A. Because I think the significance of</p> <p>20 something matters. And I think in this case, the</p> <p>21 significance matters more than the file size,</p> <p>22 compared to the total file size.</p> <p>23 Q. So you would do a qualitative analysis</p> <p>24 instead of a quantitative analysis?</p> <p>25 A. I think it's a different kind of analysis.</p>

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<p>1 You could do -- you could still do a quantitative 2 analysis of significance, rather than a quantitative 3 analysis of the file size. 4 You could also do a qualitative one if you 5 wanted, as well. 6 Q. You haven't done a quantitative analysis 7 of the portion of WWE 2K made up of Mr. Orton's 8 tattoos, right? 9 A. I have not done a quantitative analysis of 10 the proportion of his tattoos with regard to the 11 game. I think that's what you asked me. 12 Q. Is it your view that a portion of WWE 2K's 13 sales and profits are attributable to 14 Ms. Alexander's copyrightable works? 15 A. If by copyrighted works you refer to her 16 tattoos that she made for Randy Orton, the real-life 17 person, that was then copied and then put in the 18 game, then I think yes. 19 Q. You don't say how much? 20 A. No, I do not say how much. 21 Q. And you never discuss how much -- strike 22 that. 23 What is your basis for that conclusion? 24 A. I believe that is what most of my report 25 is establishing.</p>	<p>1 at the end of the article or page 5 of the article, 2 the last sentence of the article, before you get to 3 the author's information, it's about THQ's WWE 4 SmackDown versus RAW 2009? 5 A. Yes. The first line says, "THQ's WWE 6 SmackDown versus RAW 2009 hits all platforms on 7 Sunday, November 9th." 8 Q. You understand that that game is not at 9 issue in this case, right? 10 A. Correct. 11 Q. And it was created by a company that's not 12 a party to this case? 13 A. Correct. It was created by THQ. I can't 14 say for sure if Take-Two was not involved in that or 15 not. 16 Q. Okay. If you turn to page 2 -- I'm sorry, 17 I should say for the record, this is an article from 18 Destructoid.com, dated November 3, 2008, entitled, 19 "WWE's Randy Orton talks video games violence having 20 his face in the game," right? 21 A. That is the title of the game -- of the 22 article, yes. 23 Q. So if we turn to page 2, this is an 24 interview of Mr. Orton, right? 25 A. Let me take a look. Yes, that's what it</p>
Page 223	Page 225
<p>1 Q. There is nothing outside of your report 2 that supports as to that conclusion, right? 3 MR. FRIEDMAN: Object to form. 4 THE WITNESS: That I'm relying on, no. 5 MR. SIMMONS: I'm going to show you a 6 document. This is Deposition Exhibit 2. 7 (The referred-to document was marked by 8 the court reporter for Identification as 9 Deposition Exhibit 2.) 10 THE WITNESS: Okay. 11 BY MR. SIMMONS: 12 Q. This is an article cited by you in your 13 report, right? 14 A. I have to look at my report. If you say 15 so. 16 Q. You don't remember whether you cited to 17 this article? 18 A. This specific one? I cited a lot of 19 things. I don't remember exactly all of them. 20 Q. Well, I will represent to you that this 21 was an article that you cited in your report. 22 A. I will believe you. 23 Q. This article is from 2008, right? 24 A. Uh-huh. 25 Q. And you would agree it is -- if you look</p>	<p>1 looks like. 2 Q. If you look at the section that starts 3 with the question, it's sort of a continuation of, 4 "Yes, that's what they tell me." 5 Do you see that? 6 A. Yes, I see that. 7 Q. There's a paragraph there where Mr. Orton 8 discusses his brother playing the WWE video game 9 discussed in this article. 10 Do you see that? 11 A. Yes. 12 Q. And he says his brother is into wrestling 13 games in general, right? 14 A. Yes. 15 Q. Would you agree that consumers are more 16 likely to purchase WWE 2K games because they like 17 wrestling games? 18 A. Yes, I think that's -- that's a fair 19 assumption. 20 Q. And, in fact, if you go to page 5, the 21 very top of the page, Mr. Orton says, "Fans of 22 wrestling are fans of wrestling video games," right? 23 A. Yes, that's what he says. 24 Q. And that's true, isn't it? 25 A. That's likely. Whether it's true or not</p>

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1 is a separate question.

2 Q. Do you know whether that's true or not?

3 A. Hmm. So, the statement here is pretty
4 narrow. Do I believe there are fans of wrestling
5 who are not fans of video games? I think those
6 people exist. So not all fans of wrestling are also
7 fans of wrestling video games. And so...

8 Q. But you know many are, right?

9 A. Yes.

10 Q. If you go back -- I'm sorry for jumping
11 around -- if you go to page 3, the top of the page,
12 he talks about comparing WWE games to Saints Row and
13 Saints Row 2.

14 Do you see that?

15 A. Yes.

16 Q. Are you familiar with either of those
17 games?

18 A. Yes.

19 Q. And what are they?

20 A. I would describe them as open-world action
21 games.

22 Q. And Mr. Orton describes them as involving
23 cursing and prostitution and drug use and murdering
24 and suicide and carjacking, right?

25 A. Yes, that's what he lists right here.

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1 Q. And then he said that there's none of that
2 in the WWE game?

3 A. That's what he says, yes.

4 Q. And isn't it true that one of the selling
5 points for the WWE game is that it doesn't have the
6 type of hyper-violence and drug use?

7 A. I don't know that that's a selling point.
8 I'm not aware of any marketing materials related to
9 WWE games where they highlighted the fact that, Hey,
10 we don't have gory violence.

11 Q. But Mr. Orton does think that that is a
12 benefit to WWE, right, 2K?

13 A. I'm not sure that he means it as a
14 benefit. I think he's using it as a point of
15 comparison.

16 Q. Well, he says, starting on page 2, "You
17 know our product isn't as violent as a lot of games,
18 and the wrestling game is definitely not as violent.
19 I mean, have you seen Saints Row or Saints Row 2?
20 There's cursing and prostitution and drug use and
21 murdering and suicide and carjacking, the list goes
22 on. There's none of that in the WWE game," right?

23 A. That's what he says, yes.

24 Q. So don't you understand that to be him
25 making a positive comparison between WWE -- WWE

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1 and -- strike that.

2 Don't you understand that as being a
3 positive comparison of this WWE game over Saints Row
4 or Saints Row 2?

5 A. Just looking at the paragraph, no. I just
6 see him making that point of comparison. But if you
7 give me a minute, I would like to read to the
8 question that leads to him giving that answer,
9 because I think that might give us more context.

10 So the question -- I'm going to read it
11 out loud. "Some video games get a lot of flack for
12 being overly violent, as far as entertainment is
13 concerned. I think professional wrestling, to some
14 extent, is open to that kind of criticism as well.
15 At the end of the day, both are forms of
16 entertainment. Do you" -- and he's referring to
17 Randy Orton -- "see any parallels between how people
18 view violence in games and violence in wrestling?"

19 So I think the question is asking, Hey,
20 how do you compare the violence in -- in these, and
21 then Randy, I think, is answering that, saying, I
22 think there's less violence in the wrestling video
23 games than there is in other video games, such as
24 Saints Row and Saints Row 2.

25 I don't think he's saying it's better or

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1 worse. I think he's just saying it's different.

2 Q. I'm going to show you what I'm going to
3 mark as Deposition Exhibit No. 3. And I will
4 represent to you that this is another article that
5 you cite in your report.

6 (The referred-to document was marked by
7 the court reporter for Identification as
8 Deposition Exhibit 3.)

9 MR. SIMMONS: For the record, this is an
10 article titled, "The 20 Coolest Tattoos in WWE
11 History."

12 BY MR. SIMMONS:

13 Q. Do you see that?

14 A. Yes.

15 Q. And you cite to the part of this article
16 on page 12 that talks about Mr. Orton's tattoo.

17 Do you see that?

18 A. Page 12, yes.

19 Q. Now, this article is talking about Randy
20 Orton's tribal design on his back -- his neck,
21 shoulders and upper back, right?

22 A. Yes. "Location: Back and shoulders," is
23 what it says here.

24 Q. Are you aware that Ms. Alexander did not
25 create the original back tattoo that Mr. Orton had?

58 (Pages 226 to 229)

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<p>1 A. I couldn't tell you which tattoos 2 Ms. Alexander made specifically on Randy Orton. 3 Q. So it wouldn't surprise you that she only 4 created some embellishment on this back tattoo? 5 A. Like I said, I don't know what tattoos or 6 what parts of what tattoos she worked on. 7 Q. But when this article ranks Mr. Orton's 8 tattoos, that's the tattoo that they're talking 9 about, right, the tribal design on this back and 10 shoulders? 11 You can look at page 11, if that helps. 12 A. Yeah, so it refers to the back tattoo, but 13 also how that back tattoo works with other tattoos 14 he has. 15 Q. But the ranking that you relied on has to 16 do with the back tattoo tribal design? 17 A. So the title for his entry as fifth in 18 ranking says, "Randy Orton. Tattoo: Tribal design. 19 Location: Back and shoulders." 20 Q. And your understanding is that this a 21 ranking of the back tattoo, right? 22 A. I would say it's a ranking of his tattoos 23 that emphasizes the back one, and the back and 24 shoulder. 25 Q. But the ranking is of the back tattoo,</p>	<p>1 articles that you relied on in your report. I 2 think we're on article 4. 3 (The referred-to document was marked by 4 the court reporter for Identification as 5 Deposition Exhibit 4.) 6 BY MR. SIMMONS: 7 Q. And this is an article called, "Top 10 8 Coolest WWE Tattoo," by Sportskeeda. 9 A. Yes. 10 Q. Do you see that? 11 A. Yes. 12 Q. Is Sportskeeda an academic source on 13 tattoos? 14 A. I do not believe so. 15 Q. Okay. And this is an article about 16 Mr. Orton's tattoos, and it says, "Randy Orton has a 17 picturesque wrestling body. Impressive tattoos are 18 engraved on Randy's neck, shoulders and upper back." 19 Do you see that? 20 A. Yes. 21 Q. That, again, is talking about his back 22 tattoo, right? 23 A. Neck, shoulders and upper back is what it 24 says. 25 Q. And that's the one we were just looking</p>
Page 231	Page 233
<p>1 right? 2 A. Like I said, it's about his tattoos, and 3 they specifically call out back and shoulders. 4 Q. The ranked one is the back tattoo, right? 5 MR. FRIEDMAN: Objection, form. 6 THE WITNESS: I didn't make that ranking 7 myself. 8 MR. FRIEDMAN: Asked and answered several 9 times. 10 BY MR. SIMMONS: 11 Q. The ranking is for the back tattoo? 12 MR. FRIEDMAN: Asked and answered. 13 THE WITNESS: So the ranking is of, and I 14 quote the title of the article, "The 20 Coolest 15 Tattoos in WWE History." The header says, 16 "Tattoo: Tribal design. Location: Back and 17 shoulders." 18 BY MR. SIMMONS: 19 Q. So the ranked tattoo is the back tattoo? 20 MR. FRIEDMAN: Asked and answered. 21 THE WITNESS: I would say it looks like 22 both -- the entry here is primarily about the 23 back tattoo, back and shoulders tattoo. 24 BY MR. SIMMONS: 25 Q. I'm going to show you another of the</p>	<p>1 at, the back tattoo, right? 2 A. Well, it says neck, shoulders and upper 3 back. I don't know how that -- 4 Q. Do you know what tattoos Randy Orton has 5 on his neck, shoulders and upper back? 6 A. I cannot describe all the tattoos that he 7 has on his body and which tattoos are distinct from 8 other tattoos. 9 Q. Are you familiar with a website called 10 AllGame? 11 A. Is it one -- did I cite it in my report? 12 Q. You did. 13 A. Okay. 14 Q. Are you familiar with it? 15 A. I would say it's not a cite that I 16 generally rely upon. 17 Q. It's not an academic-article website, 18 right? 19 A. I don't believe I cite it as an 20 academic-article website. 21 Q. You actually don't cite any academic 22 articles in your report, do you? 23 A. I do not recall. I would have to check 24 the report. 25 Q. Do you remember citing any academic</p>

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1 articles in your report?

2 A. I remember reading academic articles.

3 Q. Do you remember citing them?

4 A. I don't. I do not remember citing them.

5 We can go to the report to see.

6 Q. All right. Let's take a break.

7 THE VIDEOGRAPHER: We are going off the
8 record at 1:33 p.m.

9 (Thereupon, a recess was taken, after
10 which the following proceedings were held:)

11 THE VIDEOGRAPHER: This is the beginning
12 of DVD 5, and we are back on the record at
13 1:45 p.m.

14 BY MR. SIMMONS:

15 Q. Dr. Zagal, how did you identify the
16 articles cited in your reports?

17 A. A collection of methods, starting with
18 general search queries into search engines,
19 following links from other articles. I would say
20 those are the two main ones.

21 Q. Any others?

22 A. Not that I can recall offhand.

23 Q. What did you search for?

24 A. Oh, I could not give you a list of all of
25 the different search terms that I tried and used.

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1 Q. Can you give me any of them?

2 A. I would imagine I searched for Orton,
3 tattoos, WWE, the titles of the video games. I'm
4 pretty sure I did those.

5 Q. Any others that you're aware of?

6 A. Maybe also used fan. I think others might
7 have been related terms.

8 Q. What did you do to select the articles for
9 inclusion in your report once you had identified
10 them?

11 A. So I read them, and based on what I read,
12 I made the determination on whether or not to
13 include them, I guess, based on the content of the
14 articles.

15 Q. So you were looking for things that would
16 support the opinions that you had put in your
17 report?

18 A. I did not have a pre-formed opinion.

19 Q. You had mentioned earlier that you would
20 find multiple articles, and you would select one
21 from the group of articles?

22 A. Uh-huh.

23 Q. What was your basis for selecting the
24 articles that you cited in your report?

25 A. So why would I pick one over others? How

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1 directly it addressed an issue, how -- the degree of
2 relevance to an issue, what the source was, I guess
3 looked at some of the videos, the number of views,
4 for example.

5 Q. Did you exclude any articles you
6 identified because you did not view them as
7 reliable?

8 A. It was more selecting than excluding.

9 Q. So you looked at a group of articles and
10 chose the ones that you thought best supported the
11 opinions that you had been drawing from reviewing
12 the articles, right?

13 MR. FRIEDMAN: Objection,
14 mischaracterizes.

15 THE WITNESS: Yes. So, it's a process,
16 and the process was not: Do a bunch of
17 searches and get a set of articles and then
18 only work off of those.

19 BY MR. SIMMONS:

20 Q. Did you run any searches in the social
21 science research network database?

22 A. Specifically, no. That included, maybe.
23 So there are different kinds of research databases,
24 and some include or I might have also searched
25 through those materials, but that might not be

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1 upfront.

2 Q. Other than Google, did you run research on
3 any other databases?

4 A. Yes. I think I used the university -- the
5 University of Utah's library search as well.

6 Q. Their general search?

7 A. Well, their general search of library's
8 collections and materials.

9 Q. But you didn't cite any materials from the
10 library's collections, right?

11 A. Not specifically.

12 Q. If someone wanted to replicate your
13 methodology in reaching your opinions in this case,
14 they wouldn't be able to do that, right?

15 A. So part of my work relies on the fact that
16 I'm an expert in games and game culture and the game
17 industry. So would a random person off the street
18 be able to do what I did? Well, if they could, then
19 why is an expert needed?

20 Q. Dr. Zagal, if someone wanted to replicate
21 your methodology in reaching your opinions in this
22 case, they wouldn't be able to do that, right?

23 A. I think someone could read my report and
24 follow the logic and follow the sources as they are
25 sourced and footnoted.

60 (Pages 234 to 237)

<p style="text-align: right;">Page 238</p> <p>1 Q. But they would not be able to read your 2 report and determine how you identified the articles 3 on which you base your opinions, right? 4 A. I don't think my report explicitly states 5 how the articles I chose to cite were selected. I 6 don't believe I did that in the report. 7 MR. SIMMONS: No further questions. 8 MR. FRIEDMAN: We can go off the record. 9 THE VIDEOGRAPHER: Going off the record at 10 1:50 p.m. 11 (Thereupon, a recess was taken, after 12 which the following proceedings were held:) 13 THE VIDEOGRAPHER: This the beginning of 14 DVD 6. We are back on the record at 2 p.m. 15 CROSS-EXAMINATION 16 BY MR. FRIEDMAN: 17 Q. Welcome back, Dr. Zagal. I just have a 18 few questions for you. 19 You stated earlier in this deposition that 20 you were an expert in game culture. I would like 21 you to please explain what the subject matter of 22 game culture entails. 23 MR. SIMMONS: Objection, leading. 24 BY MR. FRIEDMAN: 25 Q. You can answer.</p>	<p style="text-align: right;">Page 240</p> <p>1 A. Yes, for many years. 2 Q. And you wrote academic articles in those 3 areas? 4 A. Yes, for many years. 5 Q. You mentioned the history of games as 6 being part of game culture and your expertise. 7 Have you studied the history of video 8 games? 9 A. I have studied, yes. 10 Q. And have you written papers on the history 11 of video games, or involving the history of video 12 games? 13 A. Yes. 14 Q. And you mentioned the technology behind 15 the video games. 16 Have you written papers or studied the 17 technology behind video games? 18 A. Yes. 19 Q. Okay. You also mentioned game hardware. 20 Have you studied or written papers on game hardware? 21 A. Yes. 22 Q. You mentioned part of your expertise has 23 to do with trends in video games; is that right? 24 A. Yes. 25 Q. Okay. What types of trends in video games</p>
<p style="text-align: right;">Page 239</p> <p>1 A. So one of the things I stated, game 2 culture is pretty broad, but I would broadly 3 categorize it as things that have to do with games, 4 the history of games, the technology behind games, 5 the knowledge and information about the companies 6 that make games, the people that makes games, their 7 histories and trajectories, also player preferences 8 and how these might change and not change over time, 9 what its purposes are, commentary about games and 10 also about games, trends in games, the intersection 11 of trends in games with other things, the 12 intersection of trends in games with player 13 references. I think I said that already. 14 Q. Let me ask you, have you researched and 15 studied player preferences as they relate to video 16 games? 17 A. So I have done studies in -- where the 18 primary data source was reviews about games, written 19 by players, so non-professionally written reviews. 20 Q. And you have studied commentary and 21 analyses of video games? 22 A. Yes. A lot of my papers are about 23 analyzing games or present specific analyses of 24 games. 25 Q. You performed research in that area?</p>	<p style="text-align: right;">Page 241</p> <p>1 have you studied? 2 A. It can be all kinds. Some have to do with 3 genres, for example, how genres were established, 4 how they change over time, how they are perceived by 5 players, how they evolve. 6 Also, a lot of this comes up in my 7 teaching as well, which is entirely, I guess, at 8 this point game-specific. So, in a mobile game 9 class I taught, I don't know, we had to -- when I 10 say we, me and the students together, looked at 11 games and kind of understand what the mobile game 12 issue was like, what the trends were, in terms of 13 sales and in terms of popularity of titles and the 14 reasons why those trends might have been occurring 15 at the moment in time, all geared towards students 16 who have an interest in making these kinds of games 17 and wanting to learn from that. 18 Q. Is scholarship and research involved in 19 games in which realism or verisimilitude is an 20 important element? 21 MR. SIMMONS: Objection, leading. 22 THE WITNESS: I have written papers where 23 realism and verisimilitude are part of those 24 papers, yes. 25</p>

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1 BY MR. FRIEDMAN:

2 Q. Okay. And has your scholarship and
3 research in player interpretations or preferences
4 involved games that attempt to achieve some degree
5 of realism or verisimilitude?

6 MR. SIMMONS: Objection, leading.

7 THE WITNESS: I would say yes, especially
8 in the sense -- so recently, on the player
9 reviews, I did all kinds of reviews of players
10 that include games that are notable for --
11 genres of games that are notable for trying to
12 achieve realism or verisimilitude, sports games
13 being an example of that one genre.

14 BY MR. FRIEDMAN:

15 Q. You've written academic papers in that one
16 area, right?

17 A. Broadly speaking, yes.

18 MR. FRIEDMAN: No further questions.

19 REDIRECT EXAMINATION

20 BY MR. SIMMONS:

21 Q. Dr. Zagal, before you were redirected by
22 my colleague, we took a break and you left the room;
23 is that correct?

24 A. That is correct.

25 Q. Did you speak to Mr. Friedman about the

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1 subject matter of your rebuttal testimony before you
2 gave it?

3 A. What do you mean? Did we speak about what
4 I just said right now? No.

5 MR. SIMMONS: No further questions.

6 THE WITNESS: This concludes DVD 6 and the
7 end of the videotaped deposition of Jose Zagal.
8 We are going off the video record on
9 August 1st, 2019, at 2:05 p.m.

10 (The deposition was concluded at 2:05
11 p.m.)
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1 C E R T I F I C A T E
2 S T A T E O F M I S S O U R I)

3 C O U N T Y O F S T. L O U I S)

4 I, KELLI ANN WILLIS, a Registered
5 Professional Reporter and Certified Realtime
6 Reporter, do here by certify:

7 That the foregoing proceedings were taken
8 before me at the time and place herein set forth;
9 that the witnesses in the foregoing proceedings,
10 prior to testifying, were placed under oath; that a
11 verbatim record of the proceedings was made by me
12 using machine shorthand which was thereafter
13 transcribed under by direction; that the foregoing
14 is a true recording of the testimony given.

15 Before completion of the deposition,
16 review of the transcript was requested. If
17 requested, any changes made by the deponent (and
18 provided to the reporter) during the period allowed
19 are appended hereto.

20 I further certify that I am not interested
21 in the outcome of the action.

22 WITNESS my hand this date, 5 July 2019.
23

24 _____
KELLI ANN WILLIS, RPR, CRR
25 Certified Court Reporter
State of Missouri

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5 CASE: CATHERINE ALEXANDER v. TAKE-TWO INTERACTIVE SOFTWARE, INC.,
6 DATE: AUGUST 1, 2019

7 WITNESS: JOSE ZAGAL REF: 25723

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21 _____
JOSE ZAGAL

22 Subscribed and sworn to before me

23 this ____ day of _____, 20__.

24 _____
25 Notary Public

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